Supreme Court, U.S.
FILED
081552 JUN 11 2009
IN THE OFFICE OF THE CLERK

No. 08-

Supreme Court of the United States

HERBERT FREEMAN, JR, individually and in his capacity as Representative of the estate of Ethel Freeman; BRENDA BISSANT, GLENDA ELEBY, GRIFFIN ELEBY, JR, ROSALIE BROOKS, DOROTHY BEAL, RODNEY JACKSON, individually and for the Estate of Ethel Jackson, NANCY ELEBY and BARBARA ELEBY LEE, individually and in her capacity as representative of the estate of Clementine Eleby; and, FRANCES LODRIGUSS, individually and in her capacity as representative of the estate of JOHN J. DELUCA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER D. DERBES
LAW OFFICE OF PETER D. DERBES
3914 Canal Street
New Orleans, LA 70119
(504) 486-5006

FRANK A. SILVESTRI
Counsel of Record
JOHN PAUL MASSICOT
M. DAMIEN SAVOIE
SILVESTRI AND MASSICOT
3914 Canal Street
New Orleans, LA 70119
(504) 482-3400

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

Is the United States absolutely immune for negligence, abuses of discretion or willful misconduct in the federal government's response to Hurricane Katrina which resulted in the deaths of three American citizens? The United States Court of Appeals for the Fifth Circuit erred in affirming the dismissal on the pleadings of Petitioners' consolidated wrongful death claims brought by the families of three elderly Louisiana residents who died from exposure and lack of food, water and basic humanitarian aid in the aftermath of the storm. Petitioners respectfully submit that the conduct of federal employees who unreasonably delayed or denied such aid to decedents is not shielded by sovereign immunity under the discretionary function exceptions of either the Stafford Act or the Federal Tort Claims Act and Petitioners complaints allege facts, when deemed true, that state a claim to relief that is plausible on its face.

The decision of the Fifth Circuit below is in conflict with the decisions of this Court in *Gaubert v. United States*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), *Berkovitz v. United States*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) and *Bell Atlantic Corp.* v. *Twombly*, 550 U. S. 544 (2007) and the decision of the Sixth Circuit Court of Appeal in *Downs v. United States*, 522 F.2d 990 (6th Cir. 1990).

The following questions are presented for the Court's consideration:

I. Did the United States owe decedents, who were in known peril, a duty of aid that was not discretionary on the facts of these cases?

A. Does the Stafford Act's discretionary function immunity exception permit Petitioners' claims on the facts alleged and shown?

B. Is every wrongful act or omission of government alleged by Petitioners, including abuses of discretion or willful misconduct that shocks the conscience, shielded by sovereign immunity?

II. Did Petitioners' complaints contain sufficient factual content, which if accepted as true, "state a claim to relief that is plausible on its face"?

A. Did the Fifth Circuit err in failing to draw presumptions and inferences from the facts in favor of Petitioners and granting the Motion to Dismiss at the pleading stage?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW ...	i
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
FEDERAL STATUTES INVOLVED	1
STATEMENT OF THE CASE	3
A. Statement of the Facts and Pertinent Regulatory History	3
B. Proceedings Below	11
C. Basis For Federal Jurisdiction In The Courts Below	13
REASONS FOR GRANTING THE PETITION ..	13
REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE FIFTH CIRCUIT DECISION BELOW AND THIS COURT'S *GAUBERT* AND *BERKOVITZ*	

Contents

Page

PRECEDENT TO ADDRESS FUNDAMENTAL ISSUES OF SOVEREIGN IMMUNITY ARISING FROM THE FEDERAL GOVERNMENT'S NEGLIGENT RESPONSE TO HURRICANE KATRINA WHICH RESULTED IN THE WRONGFUL DEATHS OF FREEMAN, ELEBY AND DELUCA. FURTHERMORE THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *TWOMBLEY* AS THE FACTUAL CONTENT OF PETITIONERS' COMPLAINTS PERMIT A REASONABLE INFERENCE THAT THE UNITED STATES IS LIABLE FOR THE MISCONDUCT ALLEGED, REQUIRING DENIAL OF THE FEDERAL GOVERNMENT'S MOTION TO DISMISS. 14

I. Did the United States owe decedents, who were in known peril, a duty of aid that was not discretionary on the facts of these cases? 16

A. Does the Stafford Act's discretionary function immunity exception permit Petitioners' claims on the facts alleged and shown? 20

Contents

Page

B. Is every wrongful act or omission of government alleged by Petitioners, including abuses of discretion, willful misconduct or conduct that shocks the conscience, shielded by sovereign immunity? 32

II. Did Petitioners' complaints contain sufficient factual content, which if accepted as true, "state a claim to relief that is plausible on its face"? 38

A. Did the Fifth Circuit err in failing to draw presumptions and inferences from the facts in favor of Petitioners and granting the Motion to Dismiss at the pleading stage? 40

CONCLUSION 41

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed January 22, 2009 (As Corrected) 1a

Appendix B — Order And Reasons Of The United States District Court For The Eastern District Of Louisiana Dated April 30, 2007 .. 40a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed March 18, 2009 ..... 61a

Appendix D — Relevant Statutes 64a

TABLE OF CITED AUTHORITIES

Page

CASES:

Ashcroft v. Iqbal, 556 U.S. ___ (2009) 39

Bell Atlantic Corp. v. Twombly, 550 U. S. 544 (2007) ..... i, 18, 38, 39, 40

Berkovitz v. United States, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) ..... *passim*

Downs v. United States, 522 F.2d 990 (6th Cir. 1990) ..... i, 30, 31

Gaubert v. Unites States, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) ..... *passim*

Indian Towing v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955) 31, 37

Montez v. Department of the Navy, 392 F.3d 147 (5th Cir. 2004) 40

Neitzke v. Williams, 490 U,S. 319 (1989) 39

Rayonier, Incorporated v. U.S., 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed. 2d 354 (1957) 31

Underwood v. U.S., 356 F.2d 92 (5th Cir. 1956) ... 31

Cited Authorities

Page

STATUTES:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 13

The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680 ..... 2, 13, 20

The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 ..... 1, 6, 13, 20

44 C.F.R. Sec. 206.5 25

OPINIONS BELOW

The corrected opinion and judgment of the United States Court of Appeals for the Fifth Circuit in *Freeman, et al. v. U.S. Dept Homeland Security* (5th Cir. 2009) is reproduced at Appendix A, p. 1a, et seq. The opinion of the District Court is reproduced at Appendix B, p. 40a, et seq. The Denial of Petitioners Petition For Rehearing by the Fifth Circuit is reproduced at Appendix C, et seq.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit upholding the District Court judgment was entered on January 22, 2009. Petitioners filed a timely Petition for panel rehearing which was denied by the Fifth Circuit on March 18, 2009. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The following provisions of federal law are in issue in this case:

The Stafford Act, at 42 U.S.C. § 5148, provides, in part:

The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

The Federal Tort Claims Act, 28 U.S.C. § 2680(a) provides, in part:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Homeland Security Presidential Directive/HSPD-5 (16) provides, in part:

> The Secretary shall develop, submit for review to the Homeland Security Council, and administer a National Response Plan (NRP) . . . This plan shall integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all-hazards plan.

STATEMENT OF THE CASE

A. Statement of the Facts and Pertinent Regulatory History

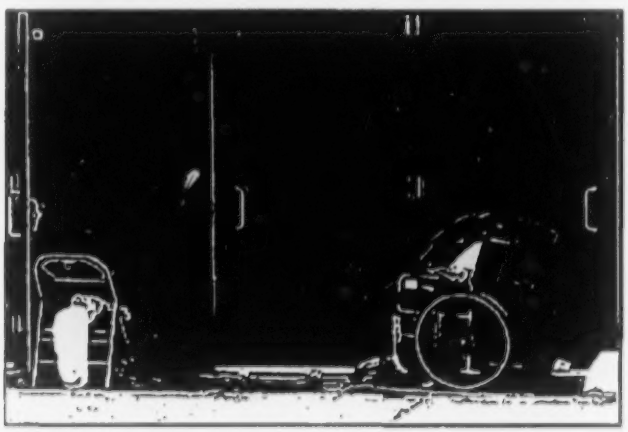
For purposes of this Application, Petitioners adopt the recitation of facts set forth in the opinion of the U.S. Fifth Circuit Court of Appeals, Appendix A, at pages 3a-6a. The following facts support their Application[1]:

Petitioners are the relatives or representatives of Ethel Freeman, John J. DeLuca, and Clementine Eleby ("decedents"). Because of impaired mobility and illness, as well as the fact that no arrangements were made by any government officials to transport the sick and elderly out of the city, decedents were stranded in New Orleans when Hurricane Katrina made landfall near the city on August 29, 2005. After three distinct travails, Ms. Freeman, Mr. DeLuca, and Ms. Eleby died in the subsequent days. The nation witnessed these tragedies unfold on television news coverage of the events. Ms. Freeman died on Wednesday, September 1, 2005, at the New Orleans Convention Center. She was chronically ill and stayed in her home when Hurricane Katrina came ashore. After waters from Lake Pontchartrain breached the Industrial Canal, 17th Street flood walls, and London Avenue flood walls, water flooded her home to a depth of several feet. On August 31, 2005, Ms. Freeman's son, Herbert Freeman, Jr. ("Herbert"), borrowed a boat from a friend, placed Ms. Freeman in her wheelchair, and moved her into the boat. Herbert then shuttled

---

1. Record, Freeman I, Vol. 1, p. 29, et seq; Eleby I, Vol 1, p. 9, et seq; Lodriguss I, Vol. 1, p. 5, et seq.

Ms. Freeman to higher ground. Once the Freemans reached dry land, New Orleans police officers directed them to the Convention Center. At the Convention Center, Herbert notified police officers that Ms. Freeman needed medical attention. They told him a bus would come to evacuate Ms. Freeman. Nothing called for by the National Response Plan was provided at the Convention Center. Squalid conditions existed with no food, water, medical assistance, triage, or transportation to take people with medical needs to other facilities. Ms. Freeman died the next day. An image of her blanket-covered body was broadcast on national television.



Ms. Eleby also died at the Convention Center on September 1, 2005. Because she was bedridden, a physician advised her to evacuate to a local hospital as the hurricane approached. Ms. Eleby's caretaker, Barbara Eleby Lee, contacted officials to try to make such arrangements. Unfortunately there was a dearth of available beds at local hospitals and she was told she should go to the superdome. When Ms. Eleby was able to reach officials to try to get her mother to the

BEST AVAILABLE COPY

Superdome, she was informed that no beds would be provided. As a result, Ms. Eleby stayed at her residence with Barbara Eleby Lee and other members of her family. The storm trapped them in their home. On August 30, 2005, first responders arrived by boat. Rescuers in the first boat to approach offered to take Ms. Eleby's family if they left her behind; the potential rescuers did not want to take her because she was paralyzed and bedridden. Her family refused, and when a second boat approached, they placed her in it first. That boat delivered them to Chef Menteur Highway, where they spent a harrowing night without food, water, shelter, or medical care. The next day, Ms. Eleby's family carried her to an interstate highway, where rescuers in a large truck picked them up and transported them to the Convention Center. At the Convention Center, Ms. Eleby experienced the same squalid conditions as did Ms. Freeman. As noted above, the Convention Center was not equipped with food, water, medical assistance, triage, or transportation. Ms. Eleby died at the Convention Center the following day.

Mr. DeLuca died at Louis Armstrong International Airport on September 3, 2005. Before the storm, Mr. DeLuca resided in the Nazareth Inn, an independent and assisted living facility in eastern New Orleans. After Hurricane Katrina came ashore, flood waters surrounded and flooded the facility. A helicopter crew rescued Mr. DeLuca and delivered him to the nearby University of New Orleans (UNO)[2] campus. When this appeared to be in danger from rising waters, another

---

2. UNO was incorrectly identified in the original Deluca complaint as the Pontchartrain Center.

helicopter transferred him to the interchange of Interstate 10 and Causeway Boulevard (Cloverleaf). He arrived there on August 30, 2005. The Cloverleaf was not equipped with food, water, shelter, medical assistance, triage, or transportation. Although some evacuation buses began to arrive on August 31, 2005, Mr. DeLuca was not evacuated. Still on the Cloverleaf on September 2, 2005, Mr. DeLuca collapsed from stress, heat exhaustion, hunger, and dehydration. A helicopter airlifted him to the airport. He died there the next day.

Pursuant to authority granted in part by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208, the President directed the Secretary of the Department of Homeland Security ("DHS") to develop the NRP. *See* Homeland Security Presidential Directive/HSPD-5, 2003 WL 604606, at *1 (Feb. 28, 2003). The directive tasked DHS with promulgating the NRP in order to "integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all hazards plan" and "provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers and for exercising direct Federal authorities and responsibilities." *Id.* at *4.[3]

DHS Secretary Michael Chertoff released the NRP in December 2004. The Catastrophic Incident Annex (the "Annex"), a Support annex, contained the provisions of the NRP at issue in this case. The Annex was

3. See the NRP at Freeman I, Vol. 1, p. 485, et seq.

"applicable for all hazards." *Id.* at INC-i. It "establishe[d] the context and overarching strategy for implementing and coordinating an accelerated, proactive national response to a catastrophic incident," defined as "any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions." *Id.* at CAT-1. The Annex also noted that "[a] more detailed and operationally specific NRP Catastrophic Incident Supplement (NRP-CIS) that is designated 'For Official Use Only' will be approved and published independently of the NRP Base Plan and annexes." *Id.* at CAT-1; *see also id.* At CAT-5.

The Base Plan required the DHS Secretary to "[i]dentify appropriate assets and establish agreements and procedures for their rapid deployment and employment in accordance with the NRP Catastrophic Incident Supplement" within 120 days of issuance of the NRP. *Id.* at ix. Secretary Chertoff did not complete this task until after Katrina struck, five months after the 120 day requirement set forth in the NRP.[4]

The Annex described certain situational difficulties that arise in catastrophic incidents. For example, during catastrophes, "[t]here is a significant need for public health and medical support, including mental health services." *Id.* at CAT-2. Therefore, "[m]edical support is required not only at medical facilities, but at casualty

4. Freeman I, Vol. 1, p. 30-31; NRP, Letter of Instruction, Requirements, Freeman I, Vol. 1 at p. 491.

evacuation points, evacuee and refugee points and shelters, and at other locations to support field operations." *Id.* The Annex similarly documented "Planning Assumptions." One such assumption stated: "Federal support must be provided in a timely manner to save lives, prevent human suffering, and mitigate severe damage. This may require mobilizing and deploying assets before they are requested via normal NRP protocols." *Id.* At CAT-3. The Annex also listed as a "guiding principle" that "[n]otification and full coordination with States occur, but the coordination process should not delay or impede the rapid mobilization and deployment of critical Federal resources." *Id.* at CAT-4.

Within that context, the Annex enumerated tasks that the government was to undertake in a catastrophic incident. For example: "Incident-specific resources and capabilities (e.g., medical teams, search and rescue teams, equipment, transportable shelters, preventive and therapeutic pharmaceutical caches, etc.) are activated and prepared for deployment to a Federal mobilization center or staging area near the incident site." *Id.* DHS, in particular, assumed certain responsibilities once NRP processes were implemented,[5]

---

5. DHS was to: Activate and deploy (or prepare to deploy) DHS-managed teams, equipment caches, and other resources in accordance with the NRP-CIS; Identify, prepare, and operationalize facilities critical to supporting the movement and reception of deploying Federal resources; Activate national-level facilities and capabilities in accordance with the NRP-CIS and standard NRP protocols; Establish and maintain communications with incident command authorities to ensure

(Cont'd)

while other agencies were to undertake relevant emergency support functions. The NRP and, specifically, the Annex thus formed the backbone of the federal government's response to catastrophic incidents like hurricanes.[6]

(Cont'd)
a common and current operating picture regarding critical resource requirements; As specific resource requirements are identified, advise the Department of Transportation to reprioritize and adjust accordingly the schedule of execution for resource flow in the NRP-CIS; and, Make every attempt to establish contact with the impacted State(s) to coordinate the employment of Federal resources in support of the State. *Id.* at CAT-5. Other agencies also assumed responsibilities: Activate and deploy (or prepare to deploy) agency- or ESF-managed teams, equipment caches, and other resources in accordance with the NRP-CIS; Commence ESF responsibilities as appropriate; Commence assessments of the probable consequences of the incident and projected resource requirements; and Commence development of shorter and longer term response and recovery strategies. *Id.* at CAT-5–CAT-6.

6. The NRP operated in conjunction with regulations promulgated pursuant to the Stafford Act. Those regulations provide that the Federal Emergency Management Agency ("FEMA") may issue mission assignments to other government agencies during a declared disaster. Section 206.2(a)(18) of the Code of Federal Regulations defines a mission assignment as a "[w]ork order issued to a Federal agency by [FEMA's] Regional Director, Associate Director, or Director, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance." 44 C.F.R. § 206.2(a)(18); *see also* 44 C.F.R.§ 206.7 ("All directives, known as mission assignments, to other Federal agencies shall be in writing, or (Cont'd)

As has been amply documented in the reports of congressional committees, despite the existence of the NRP and other Stafford Act regulations, the federal government was unprepared for Hurricane Katrina, and its response was universally criticized as inadequate, unorganized, and flawed. *See generally, e.g.*, H.R. Rep. No. 109-377 (2006); H.R. Rep. No. 109-377 (2006); S. Rep. No. 109-322 (2006).[7] Among the many shortcomings, FEMA officials displayed a lack of situational awareness

---

(Cont'd)

shall be confirmed in writing if made orally, and shall identify the specific task to be performed and the requirements or criteria to be followed."). Thus, certain specified FEMA officials may use mission assignments to "direct any Federal agency to utilize its authorities and the resources granted to it under Federal law . . . to support emergency efforts by State and local governments to save lives; protect property, public health and safety; and lessen or avert the threat of a catastrophe," or to "direct any Federal agency to provide emergency assistance necessary to save lives and to protect property, public health, and safety by: [e.g.,] . . . [d]istributing medicine, food, and other consumable supplies." 44 C.F.R. § 206.5. FEMA uses mission assignments to allocate resources, coordinate agency tasks, and ensure reimbursement for expenses. *See* Dep't of Homeland Sec., Nat'l Response Plan at ESF #5-2. When an agency is tasked through a mission assignment, however, it may ask another agency to provide support for a sub-task, *see Id.* at FIN-4, or may issue a "mission assignment task order," which is a "specific instruction given to a Federal agency under a mission assignment directing it to perform work of *certain quantity* or in a *certain area* under that mission assignment," *see* FEMA, Recovery Policy 9523.9: 100% Funding for Direct Federal Assistance and Grant Assistance, at VII(A)(2) (June 9, 2006).

7. Fifth Circuit Opinion, Appendix A, pgs 11a-12a.

that led to organizational inaction, and critical elements of the NRP were executed late, ineffectively, or not at all. *See* H.R. Rep. No. 109-377, at 2–5. More specifically, the record reveals that federal agencies did not initiate decisive action to assist evacuees at the Convention Center until September 2, 2005, and contains no evidence of any mission to aid evacuees at the Cloverleaf.[8]

Petitioners alleged the federal government caused or contributed to these deaths by negligently failing to perform nondiscretionary duties arising under the National Response Plan ("NRP") and for willful misconduct that shocked the conscience. After the events at issue in this case, DHS replaced the NRP with the National Response Framework. The NRP is no longer available on the government's web sites, but Petitioners filed a copy in the record.[9]

The overarching federal policy stated in the NRP is simple, clear and direct. "The primary mission is to save lives."[10]

B. Proceedings Below

For purposes of this Application, Petitioners adopt the Statement of Proceedings set forth in the Fifth Circuit Opinion. Appendix A, pgs 12a-16a. Oral

---

8. Fifth Circuit Opinion, Appendix A, p. 12a.

9. Freeman I, Vol. 1 at p. 481, et seq.

10. National Response Plan (December 2004), p. 43, Freeman I, Vol. 1 at p. 541.

argument was heard November 3, 2008. The Court found the NRP was discretionary in nature, no specific mandatory rule or regulation was violated, and that the discretionary function exceptions under the Stafford Act and Federal Tort Claims Act were equivalent. Appendix A, p. 22a. The Court stated:

> The tragedies that gave rise to this litigation were compounded by the well-documented inability of all levels of government to provide timely relief to the hurricane's victims. The federal government has publicly admitted that it made many mistakes; however, even if those mistakes caused decedents' deaths, which we are presently in no position to determine, the federal government's negligence does not give rise to tort liability absent the United States' express waiver of sovereign immunity. For the above explained reasons, we conclude that the United States has not waived sovereign immunity for the discretionary functions alleged in this case. . . .[11]

Petitioners Application for Panel Rehearing was denied by the Fifth Circuit, March 18, 2009. Appendix C, pgs. 61a - 63a.

---

11. Appendix A, p. 39a. The Court did not assume the truth of the allegation that the lack of aid contributed to these deaths. An affidavit attesting to causality from the former Public Health Director of New Orleans, Dr. Brobson Lutz, was filed of record. Freeman I, vol. 1, p. 329.

C. Basis For Federal Jurisdiction In The Courts Below

Petitioners seek a review by this Honorable Court of the judgment of the Fifth Circuit Court of Appeal which affirmed the District Court decision dismissing Petitioners' wrongful death claims. The basis for federal jurisdiction in the United States Court for the Eastern District of Louisiana was federal question, 28 U.S.C. § 1331, involving the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 and the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671–2680.

REASONS FOR GRANTING THE PETITION

May it please the Court;

Putting aside the profound moral questions raised by the facts of these cases, the obligation of the federal government to protect the people and promote the general welfare as well as the nature and scope of sovereign immunity and the discretionary function exception are implicated by the facts alleged. The negligence at issue involves not just one or two individuals, but a number of persons, some known, most unidentified, who were responsible for the federal government's negligence in response to storm victims, including decedents, trapped for days at the Convention Center and the Cloverleaf. These federal officials and employees held positions with different levels of authority and varying degrees of responsibility for the wrongful conduct alleged herein. These issues were last substantively addressed by this Court in *Gaubert v.*

United States, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) under far different facts involving a claim of negligence arising from a threatened federal bank seizure. The unusual circumstances of Petitioners' cases require further analysis and explanation than *Gaubert* was required to reach on its quite different facts, and afford an opportunity for the Court to apply or extend applicable precedent.

REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE FIFTH CIRCUIT DECISION BELOW AND THIS COURT'S *GAUBERT* AND *BERKOVITZ* PRECEDENT TO ADDRESS FUNDAMENTAL ISSUES OF SOVEREIGN IMMUNITY ARISING FROM THE FEDERAL GOVERNMENT'S NEGLIGENT RESPONSE TO HURRICANE KATRINA WHICH RESULTED IN THE WRONGFUL DEATHS OF FREEMAN, ELEBY AND DELUCA. FURTHERMORE THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THIS COURT IN *TWOMBLEY* AS THE FACTUAL CONTENT OF PETITIONERS' COMPLAINTS PERMIT A REASONABLE INFERENCE THAT THE UNITED STATES IS LIABLE FOR THE MISCONDUCT ALLEGED, REQUIRING DENIAL OF THE FEDERAL GOVERNMENT'S MOTION TO DISMISS.

Mrs. Freeman, Mrs. Eleby and Mr. DeLuca did not perish simply because a severe storm struck a vulnerable city and the federal flood protection system failed. They

died over the ensuing five days because of inexcusable negligence and disregard evident in the government's response which denied or unreasonably delayed basic humanitarian aid resulting in their prolonged exposure to the elements without food, water or basic medical aid essential to their survival.

> The numbers do not lie. Thousands of lives were saved, a tribute to the medical professionals and volunteers who worked around the clock under enormously grueling conditions. Yet, there is another, more sobering realization that can't be ignored either. Those numbers could - should – have been even greater. It wasn't a lack of effort that hindered their success. It was a lack of planning, lack of initiative, and lack of response. There were not, for example, nearly enough medical personnel teams in position prior to landfall, which led to unnecessary delays in getting the right equipment and supplies to the right people. FEMA and HHS needed to plan for the worst. Instead, they scrambled for supplies in an effort that was often times uncoordinated. In too many cases, it was too late. Clearly New Orleans residents with "special needs" paid a disproportionate price.[12]

---

12. A Failure Of Initiative, Final Report of the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, (2006), p. 302.

As inquiries investigating the aftermath of the government's response have concluded, the "Plan" embodied in the NRP was arguably sound. It was the Government's failure to follow that Plan, its disregard of mandatory requirements of the Plan and prosaic mistakes made in executing the Plan that resulted in the deaths of Freeman, Eleby and DeLuca.

This Court should reject the principle on which the Fifth Circuit's decision is based that the United States is immune at the pleading stage from these claims when such aid was called for by express federal policy set forth in the NRP.

I. Did the United States owe decedents, who were in known peril, a duty of aid that was not discretionary on the facts of these cases?

The District Court's dismissal of Petitioners' claims was expressed in the following statement:

> Because Plaintiffs have not identified a non-discretionary directive that Defendants failed to follow, no waiver of sovereign immunity applies.[13]

This Court however made it clear in *Berkovitz v. U.S.*, 486 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988) that a violation of federal *policy* can form the basis for an FTCA claim.

---

13. Order and Reasons, App B. p. 60 a.

> Thus, the discretionary function exception will not apply when a federal statute, regulation or *policy* specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive. And if the employee's conduct cannot appropriately be the product of judgment or choice, then there is no discretion in the conduct for the discretionary function to protect. [Emphasis added].

Berkovitz, supra, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958-59.

The relevant policy set forth in the former NRP which federal agencies, officials, and employees were directed to follow in this case was simple, clear and direct:

"The primary mission is to save lives. . . ."[14]

The NRP was an extensive plan for the federal government to do just that. The Fifth Circuit correctly noted the NRP was the backbone of the federal disaster response. Appendix A, p. 10a. While there is some discretionary language in the Stafford Act and the NRP itself, there are also specific directives pled by Petitioners that were either ignored, or, though set in motion, negligently executed. The negligent acts and omissions alleged in these cases run the gamut from officials at the top, Chertoff and Brown, to as yet unidentified federal employees in the chain of command

---

14. National Response Plan (December 2004), p. 43. Rec. Freeman I, Vol. 1, p.292, et seq.

who failed to carry out their duties with the requisite reasonable due care.

The Fifth Circuit stated:

> In light of the "strong presumption" that, where permitted by the relevant statute or regulation, the exercise of choice or judgment implicates relevant policy, *See: Gaubert*, 499 U.S. at 324, decisions regarding the feasibility, safety, and benefit of mobilizing federal resources in the aftermath of a national disaster are grounded in social, economic, and public policy. . . .

The presumption described in *Gaubert* is rebuttable and does not reach the fact situation, the acts and omissions, involved in this case. Furthermore, the question of "discretion", i.e., whether or not the government should have rescued or specifically, provided basic humanitarian aid in these circumstances, is not in issue, but rather the negligence alleged and evident in the rescue the government did provide. Petitioners' factual allegations and the requirement that on a Rule 12 Motion, the factual content of the Complaint is deemed true and the presumptions and inferences should be drawn against the Mover, should have precluded dismissal at the pleading stage.[15]

---

15. To survive a dismissal under Rule 12(b)(1) or (6), the Complaint must state sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 555, 570 (2007). (Cont'd)

Gaubert, a case factually distinct from Petitioners', provides as follows:

> When established governmental policy, as expressed or implied by statute, regulation or agency guideline, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. *For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.* The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on *the nature of the actions taken and on whether they are susceptible to policy analysis.* [Emphasis added].

499 U.S. 315, 325-26.

As the court is aware, *Gaubert* involved alleged negligence under the FTCA in courses of action recommended to bank officials to avoid federal seizure. Here the Court is asked to assess the requirements on federal agencies and employees of a reasonably detailed plan promulgated pursuant to Presidential Directive,

---

(Cont'd)

A claim has "facial plausibility" when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556.

that once triggered, provided sufficiently specific courses of action for government officials and agencies to take in order to effect the express policy of the United States to save lives.

As shown herein the challenged conduct is not "grounded" in the policy of the regulatory regime. Petitioners' cases necessarily implicate more than just the specifically alleged instances of negligence, abuse of discretion and willful misconduct by Chertoff and Brown. The allegations also go to the mundane operational acts of negligence of federal employees in the chain of command that underlie the Congressional findings of substantial government negligence, acknowledged in the Fifth Circuit Opinion. App. A, pgs. 11a-12a, 39a.

A. Does the Stafford Act's discretionary function immunity exception permit Petitioners' claims on the facts alleged and shown?

The Fifth Circuit correctly noted the Stafford Act, at 42 U.S.C. § 5148 does not contain the FTCA provision, "whether or not the discretion involved be abused" which is included in the discretionary function exception of the Federal Tort Claims Act (28 U.S.C. § 2680 ("Exceptions"). The Stafford Act, at 42 U.S.C. § 5148, simply provides:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty

> on the part of a Federal agency or an employee of th : Federal Government in carrying out the provisions of this chapter.

Petitioners submit Stafford establishes the breadth of immunity for these cases and its less sweeping language affords a remedy for Petitioners on the facts alleged, independent of the broader language of the FTCA since it does not include immunity for "abuses of discretion."

Petitioners alleged facts that support claims for breaches of duties that were not discretionary, abuses of discretion, willful misconduct and conduct that shocks the conscience.

Petitioners' allegations

Citing specific provisions of the NRP, Petitioners' Complaints allege, inter alia, that:

> Notification and full coordination with States will occur, but the coordination process should not delay or impede the rapid mobilization and deployment of critical federal resources. Incident specific resources and capabilities (e.g., medical teams, search and rescue teams, equipment, transportable shelters, preventive and therapeutic pharmaceutical caches, etc.) are activated.[16]

16. Petitioners' Complaints: Freeman Vol. 1, p. 7 Par. 9,; Eleby Vol. 1, p.10; DeLuca Vol. 1, p. 7. (All references are to the Fifth Circuit Record volumes).

> Again, tracking the provisions of the Plan, Petitioners specifically pled:
>
> The NRP *directs* FEMA to act on its own authority to quickly provide assistance and conduct emergency operations following a major catastrophe, pre-empting state and local authorities if necessary. [Emphasis added].[17]

Petitioners also specifically pled breach of the NRP directive that:

> . . . Medical support *is required* not only at medical facilities, but *at casualty evacuation points, evacuee and refuge points* and shelters and at other locations to support field operations.[Emphasis added][18]

Petitioners' allegations also track the NRP provisions that Federal "incident specific resources" are "activated" and "deployed," and refer to protocols to "pre-identify and rapidly deploy key essential resources (e.g., medical teams, transportable shelters, medical and equipment caches, etc.) that are expected to be urgently needed/required to save lives. . . ." Petitioners' complaints also cite the NRP provision that "Federal

---

17. Petitioners Amended Complaints: Freeman Vol. 3, Par. 5A (30), p. 1551; (DeLuca), id, Par.5 (29D), p. 1570; (Eleby) Par.5 (32D), p. 1589.

18. Petitioners' Complaints: Freeman Vol. 1, Pars. 8-9, p. 7; DeLuca Vol. 1, p. 7.

support must be provided in a timely manner to save lives, prevent human suffering. . . ."[19]

Petitioners alleged that despite the requirements of the NRP to proactively provide aid in just this kind of disaster, nothing called for by the Plan was provided by the federal government at the Convention Center [and at the Cloverleaf], refuge points, where squalid conditions existed for days with no food, water or assistance for thousands of people.[20] The complaints state:

> Despite the advance warning, the issuance of a Presidential emergency declaration, and a National Response Plan that called for DHS, FEMA, DHHS and other agencies of the United States government, under the supervision and direction of DHS, to deploy vital resources including medical teams and equipment and to evacuate patients who needed medical care and to comply with an urgent duty to save lives, defendants failed to follow their non-discretionary duties under the NRP, to take appropriate steps to marshal resources and to aid the city, the state and evacuees, including specifically, Mrs. Freeman [and Mrs Eleby at the Convention Center and Mr. DeLuca at the Cloverleaf].[21]

---

19. Ibid.

20. Petitioners' Complaints: Freeman, Pars. 23-25, Vol. 1, p. 13-14 Eleby, Pars 26-29, Vol. 1, pgs.10-11; DeLuca, Pars. 24-27, Vol. 1, p. 13-14.

21. *Id.*

Petitioners also showed Brown tasked DOD, DOT and other agencies by way of Mission Assignments to provide aid that, more likely than not, could have prevented the deaths of Freeman, Eleby and DeLuca.[22] According to Brown, he had the necessary authority to command these tasks, and did so, but by Friday, September 2nd he was left "screaming for the army".[23]

> [T]he FEMA director has . . . under the National Response Plan, and even the old Federal Response Plan, has the ability to task any department or agency of the Federal Government to do anything . . . . because we have the ability to say to DOT or HHS or anybody else, *Go do this and we're going to pay you for it. Under the Stafford Act, they're obligated to do that.* And I can do that in the smallest disaster, and we did it on 9/11. [Emphasis added][24]

---

22. Mission Assignments Brown issued to the Department of Defense on Tuesday, August 30th, were not apparently acted on before Sunday, September 4th. 500 buses Brown called for from the Department of Transportation never arrived. Deposition - FEMA Director Michael Brown, Saturday, February 11, 2006, House of Representatives, Select Bipartisan Committee to Investigate Preparation for and Response to Hurricane Katrina. Freeman I, Vol. 3, pgs 1666, 1729-34, 1709.

23. Michael Brown, Congressional testimony, Freeman I, Vol. 2, p. 643, et seq.; Vol. 3, p. 1726.

24. Deposition, FEMA Director Michael Brown, Saturday, February 11, 2006, House of Representatives, Select Bipartisan Committee to Investigate Preparation for and Response to Hurricane Katrina, Washington, D.C., Freeman I, Vol. 3, p. 1690.

The Fifth Circuit correctly noted that Mission Assignments are left to the *discretion* of FEMA per 44 C.F.R. Sec. 206.5. However this rule refers to the decision to issue Mission Assignments and begs the question of what happens when such assignments are tasked but federal employees in the chain of command are negligent in carrying them out. The discretion to issue Mission Assignments is clearly not the same as the obligations of subordinates to carry them out. Significantly, the Senate Committee on Homeland Security and Governmental Affairs found:

> While both FEMA and the Department of Health and Human Services made efforts to activate the federal emergency health capabilities of the National Disaster Medical System (NDMS) and the U.S. Public Health Service, only a limited number of federal medical teams were actually in position prior to landfall to deploy into the affected area. Only one such team was in a position to provide immediate medical care in the aftermath of the storm. FEMA's emergency-response teams were inadequately trained, exercised, and equipped. The HSOC failed in its responsibility under the National Response Plan (NRP) to provide "general situational awareness" and a "common operational picture," particularly concerning the failure of the levees, the flooding of New Orleans, and the crowds at the Convention Center. No level

> of government addressed the evacuation of the Convention Center until Friday. . . [25]

The Fifth Circuit Opinion adopts the finding of the Bipartisan Committee that: "FEMA lacked situational awareness that led to organizational inaction and critical elements of the NRP were executed late, ineffectively, or not at all."[26] This fact can, and for purposes of a Rule 12 dismissal, should have been reasonably attributed to the shortage of FEMA personnel on the ground in New Orleans after the storm because Brown's Mission Assignment to airlift them was ignored. However, the Fifth Circuit ignored these facts when it should have determined if they supported Petitioners' claims. Clearly they do, when the presumption is drawn in favor of Petitioners.

Likewise, the Fifth Circuit improperly presumed that the non-delivery of 500 buses for evacuations, despite Brown's Mission Assignment to DOT for same, would not have helped decedents is inconsistent with the court's duty to construe the pleadings, record and complaints in favor of Petitioners. A reasonable inference from such facts is that the 500 buses DOT never delivered could have evacuated Freeman, Eleby and DeLuca from the Convention Center and Cloverleaf preventing their deaths.

---

25. Hurricane Katrina: A Nation Still Unprepared Special Report Of the Committee On Homeland Security And Governmental Affairs United States Senate Washington: 2006 at Freeman I, Vol. 1, pgs. 360-63.

26. Fifth Circuit Opinion at Appendix A, p. 12a.

The negligent conduct implicated also includes significantly the failure of Chertoff to complete the Catastrophic Incident Supplement (CIS) as required by the NRP within 120 days of its release in December 2004.

> The NRP provides, inter alia, that "within 120 days of the issuance of the plan, the Secretary *will* identify appropriate assets and establish agreements and procedures for their rapid deployment and employment in accordance with the NRP Catastrophic Incident Supplement.:[27] [Emphasis added].

The Fifth Circuit concluded every act or obligation that flowed from the NRP up and down the entire chain of command was discretionary. Petitioners submit, and common sense suggests, the operative word "will" permitted Chertoff "no rightful option but to adhere to the directive." *Berkovitz*, 486 U.S. at 536. This specific requirement that Chertoff ignored would have substantially furthered the NRP mission and was crucial to effect the express federal policy to save lives.

In a copy of a letter obtained by Petitioners after this case was initially decided in the Fifth Circuit, (the letter was referenced in the Petition for Rehearing) briefly excerpted here, two Congressmen on the

---

27. See: *Note 15, supra*, Complaint, at Par. 7. Petitioners only learned much later that Chertoff did not complete the CIS until after Katrina struck, months after it was due.

Bi-Partisan subcommittee wrote to Secretary Chertoff concerning the significance of the uncompleted CIS:

> During your testimony on October 19, 2005 before the House of Representatives, you acknowledged that "there are a lot of things that didn't work well with the response" to Hurricane Katrina. You attributed these deficiencies overwhelmingly to the failure to properly plan for the federal response, stating, "I think 80 percent or more of the problem lies with the planning."
>
> * * *
>
> In order to address [a] lack of operational specificity, the National Response Plan required the development of a much more detailed annex. . . . "A more detailed and operationally specific NRP [National Response Plan] Catastrophic Incident Supplement (NRPCIS) that is designated 'For Official Use Only' will be approved and published independently of the NRP Base Plan and annexes."
>
> * * *
>
> Given your numerous statements about the importance of planning, it is unclear why your Department did not complete the detailed operational annex, which would have provided precisely the type of planning you believe was

> missing in your agency's response to Hurricane Katrina. As Secretary of Homeland Security, you are the federal official responsible for this planning function.
>
> * * *
>
> *Without the detailed operational annex to guide federal response efforts, there was tremendous confusion and an utter lack of coordination among federal agencies involved in the response efforts.* [Emphasis added].[28]

Even without this letter, Chertoff's "decision" (if it was such) not to complete the CIS within 120 days as directed by the NRP cannot presumptively be said to have been "informed by considerations of social, economic, or political policy" and could not reasonably, on the facts alleged, have "include[ed] assessments of those considerations". See concurring opinion of Justice Scalia in *Gaubert, supra*, 499 U.S. at 336. Furthermore, the Fifth Circuit erred in not finding these facts gave rise to a permissible inference that Chertoff's negligence or abuse of discretion contributed to the government's flawed response *and* decedents' deaths.

---

28. Excerpt from correspondence from Congressmen Henry Waxman and Charles Melancon to Secretary Chertoff concerning the CIS, November 1, 2005. The entire letter was provided to the Fifth Circuit panel with the Petition for Rehearing.

Judgment and discretion

In *Berkovitz v. U.S.*, this court previously found:

> If the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. . . . The exception, properly construed, therefore protects only governmental actions based on considerations of public policy.

In every case, the mere fact that a government actor had "discretion" to do what he did does not end the discussion. The President's decision to invoke the NRP, and the FEMA employee's decision to talk on his cell phone while running a stop sign, both involve exercises of discretion. Only the former is vested with "elements of judgment" that foreclose liability under the FTCA. *Berkovitz, supra,* 486 U.S. 536-37, 108 S.Ct, 1954, 1959.

In *Downs v. U.S.* 522 F.2d 990 (6th Cir. 1990), the Sixth Circuit Court of Appeals affirmed the district court finding that the discretionary function exception did not bar claims for negligence in the FBI handling of a rescue from a hijacker that resulted in the death of two hostages. The Sixth Circuit held that FBI hijacking policy wasn't being determined ad hoc, but was set forth in the FBI Handbook and a Joint Memorandum between the Departments of Justice and Transportation. The government's contention was that the FBI agent in charge of handling the hijacking had the "discretion to make an on the scene judgment as to

the best course of action during the hijacking. Since there was 'room for policy judgment,' the agents actions fell within the discretionary function exception." *Downs, supra* at 995.

The court dismissed this argument stating:

> We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is exercised in almost every human endeavor. It is not the mere exercise of judgment, however which immunizes the United States from liability for the torts of its employees.

Downs, supra, at p. 995. The Downs court noted several cases which, if the exercise of judgment were the standard for applying the discretionary function exception, have been wrongly decided, that being: *Indian Towing v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955); *Rayonier, Incorporated v. U.S.,* 352 U.S. 315, 77 S. Ct. 374, 1 L.Ed 2d 354 (1957), *Underwood v. U.S.,* 356 F.2d 92 (5th Cir. 1956). The automobile accident caused by a federal employee while on the job is the archetypical claim which Congress sought to place in the courts., but as the Downs court noted even the simple act of driving an automobile involves some judgment.

The FBI Handbook in *Downs* is at least analogous to the NRP in this case. It is evident from a reading of the NRP that many of the actions called for did not necessitate judgment calls informed by considerations of social, economic, or political policy or required

decisions that included assessments of those considerations. Nor did the mundane mistakes that delayed aid to Petitioners, which are legally indistinguishable from the federal employee running a stop sign who hits a pedestrian. The decision to rescue is not in issue, but rather the negligence in aspects of the execution of that mission. When the government undertakes to provide a service upon which others are dependent, it must do so in a reasonably prudent and competent fashion. *Indian Towing v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

B. Is every wrongful act or omission of government alleged by Petitioners, including abuses of discretion, willful misconduct or conduct that shocks the conscience, shielded by sovereign immunity?

The discretionary function immunity provision of Stafford does not contain the language found in the FTCA that shields government officials from discretionary acts "whether or not the discretion involved is abused." Petitioners contend the NRP duty to rescue was non-discretionary, and some of the negligent acts and omissions that resulted in the denial of aid to decedents amounted to an abuse of discretion or willful misconduct. The Fifth Circuit erroneously concluded:

> Here, however, we need not decide the import of this difference in statutory language because plaintiffs have not argued that government agencies or agents abused their

> discretion; instead, they have argued that they lacked discretion. . .[29]

Petitioners pled in the district court that the conduct of the United States as carried out by government officials was both non-discretionary and in particular, with regard to Brown and Chertoff amounted to "gross negligence", "willful misconduct" and/or conduct that "shocked the conscience".

The Complaints state, inter alia:

> On information and belief an aid "blockade" preventing basic humanitarian aid from reaching approximately 19,000 people at the New Orleans Convention Center was ordered by, or allowed to take place with the consent, acquiescence or cooperation of Michael Brown and Michael Chertoff who, as heads of FEMA and the Department of Homeland Security, respectively, had control over the federal resources, including aid available from the American Red Cross. This aid blockade also prevented other individuals and private relief organizations from delivering basic humanitarian aid to persons at the Convention Center including plaintiff[s] . . . between Wednesday, August *31.2005*, and Friday September 2,2005.
>
> * * *

29. Fifth Circuit Opinion at Appendix A, p. 16, note 10.

> On information and belief at least by Tuesday, August 30, defendants Brown and Chertoff ordered the delivery of federal resources, including a Medevac and/or other medical units to Chalmette Louisiana. at a point downriver from the New Orleans Convention Center. In addition to providing basic, humanitarian aid to victims of the storm, the evacuation of persons from Chalmette was carried out over the next several days by federal resources under the direction, control and approval of defendants Brown and Chertoff through the Lower Algiers Ferry Terminal using military transport and other available equipment. During this same period while such aid and evacuation were provided to said persons, approximately 19,000 people at the Convention Center had basic humanitarian aid, including water, triage and food withheld by, or with the knowledge and consent of defendants Brown and/or Chertoff all of which was a proximate cause of Mrs. Freeman's death.[30]

Petitioners alleged that aid was withheld from the Convention Center for several days while people died in full view of the nation with no help provided before Friday September 2nd. Petitioners' Complaints also allege with specific reference to the NRP, its provisions

---

30. Petitioners Amended Complaints at Freeman Vol. 3, Pars 3-4(28-29) pgs 1549-50); DeLuca, id, Par. 2-3(29A-B), pgs. 1567-68; Eleby, Pars. 2-3 (32A-B), p. 1587-88.

treating the American Red Cross as a federal agency under the control and direction of DHS and FEMA in a Presidential declared disaster.[31] It makes little sense that while thousands waited for a drink of water in sweltering heat and squalid conditions at the Convention Center and the Cloverleaf, FEMA was nonetheless able to feed, clothe and shelter 8,000 people who were being evacuated from Chalmette, while the Red Cross was kept out of the city.[32] It doesn't make sense that even if the transportation of people from the Convention Center and Cloverleaf posed a problem that required more time to resolve, that basic humanitarian aid could not be provided while Freeman, Eleby and DeLuca waited until their deaths.

Also included among the factual allegations of the unreasonable delay or denial of aid in Petitioners' complaints, is the allegation that former FEMA Secretary Michael Brown simply ignored the NRP, another express finding of the Bipartisan Congressional Subcommittee. Petitioners alleged:

> Defendant Brown's communications with the White House and his sworn statements reflect his decision to ignore the National Response Plan. Defendant Brown's deliberate actions

---

31. Petitioners Amended Complaints at Freeman Vol. 3, Pars 5(30) p. 1550; DeLuca, Par. 4 (29C), pgs. 1569and Eleby, Par. 4 (32C), p. 1588-89.

32. See: *Bridge Blockade Still Angers Many*", Times Picayune, September 3, 2007.

> in ignoring the NRP and, by order and/or acquiescence in the decision to withhold equal basic humanitarian aid to persons at the Convention Center [and Cloverleaf]. . . .
>
> * * *
>
> The conduct of defendants Brown and Chertoff in withholding basic humanitarian aid from persons in the custody of the United States at the Convention Center shocks the conscience.[33]

Brown initially claimed FEMA officials were unaware for days that thousands had taken refuge in the Convention Center. Later, Brown would admit to Congressional investigators that FEMA actually knew about the victims at the Convention Center twenty-four hours earlier. Going back further still, Brown's subordinate, William Lokey, testified that FEMA knew about the Convention Center late Tuesday or early Wednesday, sooner still than Brown ever admitted.[34] Brown's conduct suggests either that he was negligent and unaware of a situation he had responsibility for, or he attempted to conceal his knowledge. The Homeland

---

33. Petitioners Amended Complaints at Freeman Vol. 3, Pars 6-7(32-33) p. 1552; DeLuca, Par. 7-8 (29F-G), pgs. 1567-68 and Eleby, Pars. 7-8 (32F-G), p. 1589.

34. Hurricane Katrina: A Nation Still Unprepared, Special Report Of The Committee On Homeland Security And Governmental Affairs, United States Senate, S. Rept. 109-322, 2006 pp. 382-83.

Security Subcommittee concluded Brown, ". . . was insubordinate, unqualified, and counterproductive." Freeman Vol. 1 at p. 361. The Select Bipartisan Committee concluded,

> While it is clear that the federal, state, and local response was inadequate, it is not clear that the NRP itself would not have worked, or worked better, if it had been executed by those responsible for doing so, including Brown.[35]

Berkovitz provides: "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on *the nature of the actions taken and on whether they are susceptible to policy analysis.*" *Berkovitz*, 499 U.S at 325-26. Regardless of intent, the reasons why Chertoff failed to timely complete the CIS and why Brown ignored the NRP still matter in the determination of the immunity defense in this case. Ignoring the deadline for the CIS and ignoring the Plan itself were not acts or omissions within the realm of "decisions susceptible to policy analysis" any more than negligence would be in the chain of command of those charged with carrying out orders for relief. Presuming officials just dropped the ball, or their acts or omissions were so far from the policy goal of saving lives, i.e., conduct that "shocks the conscience", the U.S. is not entitled to blanket immunity

---

35. Supplementary Report And Document Annex By The Select Bipartisan Committee To Investigate The Preparation For And Response To Hurricane Katrina, March 16, 2006, Freeman I, Vol 1, p. 298-299.

at the pleading stage. The presumption of truthfulness of Petitioners' allegations requires denial of the government's motion.

Petitioners respectfully suggest no judgment or choice in the formulation of United States' policy underlying the Stafford Act, or the NRP permitted federal officials to ignore the desperate plight of American citizens for as long as occurred here. These are "facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime." *Gaubert, supra*, 499 U.S. at 325-26.

II. Did Petitioners' complaints contain sufficient factual content, which if accepted as true, "state a claim to relief that is plausible on its face"?

The requirement of FRCP 8(a)(2) is that the complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 555. (2007) but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," *id.*, at 570. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556.

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged. *Id.* at 556. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Ashcroft v. Iqbal*, 556 U.S. ___ (2009). *Iqbal* involved a more rigorous pleading requirement for the *Bivens* claim presented there (discriminatory intent) than applies here. *Id.* at p. 4.

Twombly does not require a court at the pleading stage to consider whether the factual allegations are probably true. This Court has made it clear that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly*, 550 U. S., at 555 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"); *id.*, at 556. See *Neitzke v. Williams*, 490 U. S. 319, 327 (1989).

Petitioners have alleged facts that, presumed true for purposes of a Rule 12 motion, state a cause of action. If dismissal is based on defects in the pleadings that may be cured, as demonstrated from the record, Petitioners pray that this case be remanded and that they are afforded the opportunity to amend and restate their claims pursuant to FRCP15.

A. Did the Fifth Circuit err in failing to draw presumptions and inferences from the facts in favor of Petitioners and granting the Motion to Dismiss at the pleading stage?

The Fifth Circuit clearly erred when it did not deem the factual content of the Complaints as true and drew presumptions against Petitioners in derogation of Rule 12 and *Twombly, supra*. As the Fifth Circuit instructed in *Montez v. Department of the Navy*, 392 F.3d 147 (5th Cir. 2004), "the district court can resolve factual disputes in determining jurisdiction pursuant to a Rule 12(b) motion for dismissal." However, where the dispute is determinative of both the federal jurisdiction question and the underlying federal cause of action, and thus are interdependent, a district court might err when it resolves the disputed factual issue in favor of the Government. *Id* at 148.

If Rule 8's "short statement" principle is ameliorated to the point where litigants have to plead extensive factual detail in their allegations (including facts that might only be determined through discovery) in a manner susceptible to but one interpretation, few cases will ever get past the pleading stage.

CONCLUSION

The issues presented here merit this Honorable Court's consideration of the limits of sovereign immunity on the unusual and compelling facts of these cases. Decedents' peril was known and help that had been planned and directed by the federal government in the NRP could and should have been reasonably provided. Petitioners have alleged and shown negligence, breaches of non-discretionary duties, abuses of discretion, and willful misconduct that shocks the conscience. Their complaints contain sufficient factual content, which if accepted as true, state a claim for relief that is plausible on its face and should not have been dismissed at the pleading stage.

Petitioners respectfully pray that this petition be granted.

Respectfully submitted,

FRANK A. SILVESTRI
Counsel of Record
JOHN PAUL MASSICOT
M. DAMIEN SAVOIE
SILVESTRI AND MASSICOT
3914 Canal Street
New Orleans, LA 70119
(504) 482-3400

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 22, 2009 (AS CORRECTED)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31066

HERBERT FREEMAN, Jr., Individually and in his capacity as representative of the estate of Ethel Freeman,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

BARBARA ELEBY LEE; BRENDA BISSANT; GLENDA ELEBY; GRIFFIN ELEBY, JR.; ROSALIE BROOKS; DOROTHY BEAL; EARLINE COLEMAN; ETHEL JACKSON; NANCY ELEBY,

Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appendix A

FRANCES LODRIGUSS,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

BARBARA ELEBY LEE; BRENDA BISSANT; GLENDA ELEBY; GRIFFIN ELEBY, JR.; ROSALIE BROOKS; DOROTHY BEAL; RODNEY JACKSON, for the Estate of Ethel Jackson; NANCY ELEBY,

Plaintiff - Appellants,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana.

Before KING, DeMOSS and PRADO, Circuit Judges.

KING, Circuit Judge:

We are asked whether the discretionary function exception of the Robert T. Stafford Disaster Relief and

Appendix A

Emergency Assistance Act, 42 U.S.C. § 5148, bars a suit based on the federal government's handling of relief efforts in the aftermath of Hurricane Katrina. Plaintiffs allege that the federal government's violations of various provisions of the National Response Plan render the United States liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, for the deaths of Ethel Freeman, John J. DeLuca, and Clementine Eleby. The district court held that the conduct at issue was vested in the government's discretion. It therefore dismissed plaintiffs' claims for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure because the United States had not waived sovereign immunity for its discretionary acts. We affirm.

I. FACTUAL, PROCEDURAL, AND REGULATORY BACKGROUND

A. Factual and Regulatory Background

Plaintiffs are the relatives or representatives of Ethel Freeman, John J. DeLuca, and Clementine Eleby ("decedents"). Because of impaired mobility, decedents stayed in New Orleans when Hurricane Katrina made landfall near the city on August 29, 2005. After three distinct travails, Ms. Freeman, Mr. DeLuca, and Ms. Eleby died in the subsequent days. The nation witnessed these tragedies unfold many times over.

Ms. Freeman died on Wednesday, September 1, 2005, at the New Orleans Convention Center. She was chronically ill and decided to stay in her home when

Appendix A

Hurricane Katrina came ashore. After waters from Lake Pontchartrain breached the Industrial Canal, 17th Street flood walls, and London Avenue flood walls, water flooded her home to a depth of several feet. On August 31, 2005, Ms. Freeman's son, Herbert Freeman, Jr. ("Herbert"), borrowed a boat from a friend, placed Ms. Freeman in her wheelchair, and then moved her into the boat. Herbert then shuttled Ms. Freeman to higher ground. Once the Freemans reached dry land, New Orleans police officers directed them to the Convention Center. At the Convention Center, Herbert notified police officers that Ms. Freeman needed medical attention. The officers told him a bus would come to evacuate Ms. Freeman. Squalid conditions existed at the Convention Center, and it was not equipped with food, water, medical assistance, triage, or transportation. Ms. Freeman died the day after she arrived there. An image of her blanket-covered body was broadcast on national television.

Ms. Eleby also died at the Convention Center on September 1, 2005. Because she was bedridden, a physician advised her to evacuate to a local hospital as the hurricane approached. Ms. Eleby's caretaker, Barbara Eleby Lee, contacted officials to inquire about taking Ms. Eleby to the Superdome, but she was informed that no beds would be provided. There was also a dearth of available beds at local hospitals. As a result, Ms. Eleby stayed at her residence with Barbara Eleby Lee and other members of her family. The storm trapped them in their home. On August 30, 2005, first responders arrived by boat. Rescuers in the first boat

to approach offered to take Ms. Eleby's family if they left her behind; the potential rescuers did not want to take her because she was paralyzed and bedridden. Her family refused, and when a second boat approached, they placed her in it first. That boat delivered them to Chef Menteur Highway, where they spent the night without food, water, shelter, or medical care. The next day, Ms. Eleby's family carried her to an interstate highway, where rescuers in a large truck picked them up and transported them to the Convention Center. At the Convention Center, Ms. Eleby experienced the same squalid conditions as did Ms. Freeman. As noted above, the Convention Center was not equipped with food, water, medical assistance, triage, or transportation. Ms. Eleby died at the Convention Center the following day.

Mr. DeLuca died at Louis Armstrong International Airport on September 3, 2005. Before the storm, Mr. DeLuca resided in the Nazareth Inn, an independent and assisted living facility in eastern New Orleans. After Hurricane Katrina came ashore, flood waters surrounded and flooded the facility. A helicopter crew rescued Mr. DeLuca and delivered him to the Pontchartrain Center in Kenner, Louisiana. When the Pontchartrain Center also flooded, another helicopter transferred him to the interchange of Interstate 10 and Causeway Boulevard (the "Cloverleaf"). He arrived there on August 30, 2005. The Cloverleaf was not equipped with food, water, shelter, medical assistance, triage, or transportation. Although evacuation buses began to arrive on August 31, 2005, Mr. DeLuca was not

evacuated. Still on the Cloverleaf on September 2, 2005, Mr. DeLuca collapsed from stress, heat exhaustion, hunger, and dehydration. A helicopter airlifted him to the airport. Mr. DeLuca died there the next day.

Plaintiffs in this case allege that the federal government caused or contributed to these deaths by negligently failing to perform nondiscretionary duties arising under the National Response Plan (the "NRP").[1] Pursuant to authority granted in part by the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121- 5208, the President directed the Secretary of the Department of Homeland Security ("DHS") to develop the NRP. *See* Homeland Security Presidential Directive/HSPD-5, 2003 WL 604606, at *1 (Feb. 28, 2003). The directive tasked DHS with promulgating the NRP in order to "integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all hazards plan" and "provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers and for exercising direct Federal authorities and responsibilities." *Id.* at *4.

DHS Secretary Michael Chertoff released the NRP in December 2004. The NRP "establishe[d] a single,

---

1. After the events at issue in this case, DHS replaced the NRP with the National Response Framework. Because the NRP in effect at the time of Hurricane Katrina is no longer available on the government's web sites, we cite the record version.

comprehensive framework for the management of domestic incidents." Dep't of Homeland Sec., Nat'l Response Plan iii (2004). It was organized into a Base Plan supplemented by annexes categorized into three groups: Emergency Support Function ("ESF") (corresponding to types of operational responses); Support (corresponding to organizational activities); and Incident (corresponding to types of emergencies that require "specialized, incident-specific implementation"). *Id.* at xii.

The Catastrophic Incident Annex (the "Annex"), a Support annex, contained the provisions of the NRP at issue in this case. The Annex was "applicable for all hazards." *Id.* at INC-i. It "establishe[d] the context and overarching strategy for implementing and coordinating an accelerated, proactive national response to a catastrophic incident," defined as "any natural or manmade incident, including terrorism, that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale, and/or government functions." *Id.* at CAT-1. The Annex also noted that "[a] more detailed and operationally specific NRP Catastrophic Incident Supplement (NRP-CIS) that is designated 'For Official Use Only' will be approved and published independently of the NRP Base Plan and annexes." *Id.* at CAT-1; *see also id.* at CAT-5. The Base Plan required the DHS Secretary to "[i]dentify appropriate assets and establish agreements and procedures for their rapid deployment and employment in accordance with the NRP Catastrophic Incident

Supplement" within 120 days of issuance of the NRP. *Id.* at ix. Plaintiffs allege that Secretary Chertoff completed this task on September 6, 2005.

The Annex described certain situational difficulties that arise in catastrophic incidents. For example, during catastrophes, "[t]here is a significant need for public health and medical support, including mental health services." *Id.* at CAT-2. Therefore, "[m]edical support is required not only at medical facilities, but at casualty evacuation points, evacuee and refugee points and shelters, and at other locations to support field operations." *Id.* The Annex similarly documented "Planning Assumptions." One such assumption stated: "Federal support must be provided in a timely manner to save lives, prevent human suffering, and mitigate severe damage. This may require mobilizing and deploying assets before they are requested via normal NRP protocols." *Id.* at CAT-3. The Annex also listed as a "guiding principle" that "[n]otification and full coordination with States occur, but the coordination process should not delay or impede the rapid mobilization and deployment of critical Federal resources." *Id.* at CAT-4.

Within that context, the Annex enumerated tasks that the government was to undertake in a catastrophic incident. For example: "Incident-specific resources and capabilities (e.g., medical teams, search and rescue teams, equipment, transportable shelters, preventive and therapeutic pharmaceutical caches, etc.) are activated and prepare for deployment to a Federal

mobilization center or staging area near the incident site." *Id.* DHS, in particular, assumed certain responsibilities once NRP processes were implemented,[2] while other agencies were to undertake relevant

---

2. DHS was to:

> Activate and deploy (or prepare to deploy) DHS-managed teams, equipment caches, and other resources in accordance with the NRP-CIS;
>
> Identify, prepare, and operationalize facilities critical to supporting the movement and reception of deploying Federal resources;
>
> Activate national-level facilities and capabilities in accordance with the NRP-CIS and standard NRP protocols;
>
> Establish and maintain communications with incident command authorities to ensure a common and current operating picture regarding critical resource requirements. As specific resource requirements are identified, advise the Department of Transportation to reprioritize and adjust accordingly the schedule of execution for resource flow in the NRP-CIS; and
>
> Make every attempt to establish contact with the impacted State(s) to coordinate the employment of Federal resources in support of the State.

Id. at CAT-5.

emergency support functions.[3] The NRP and, specifically, the Annex thus formed the backbone of the federal government's response to catastrophic incidents like hurricanes.[4]

---

3. Other agencies also assumed responsibilities:

> Activate and deploy (or prepare to deploy) agency- or ESF-managed teams, equipment caches, and other resources in accordance with the NRP-CIS;
>
> Commence ESF responsibilities as appropriate;
>
> Commence assessments of the probable consequences of the incident and projected resource requirements; and
>
> Commence development of shorter and longer term response and recovery strategies.

Id. at CAT-5 to CAT-6.

4. The NRP operated in conjunction with regulations promulgated pursuant to the Stafford Act. Those regulations provide that the Federal Emergency Management Agency ("FEMA") may issue mission assignments to other government agencies during a declared disaster. Section 206.2(a)(18) of the Code of Federal Regulations defines a mission assignment as a "[w]ork order issued to a Federal agency by [FEMA's] Regional Director, Associate Director, or Director, directing completion by that agency of a specified task and citing funding, other managerial controls, and guidance." 44 C.F.R. § 206.2(a)(18); (Cont'd)

Appendix A

As we all witnessed and as has been amply documented in the reports of various congressional committees, despite the existence of the NRP and other Stafford Act regulations, the federal government was unprepared for Hurricane Katrina, and its response was universally criticized as inadequate, unorganized, and flawed. *See generally, e.g.*, H.R.Rep. No. 109-377 (2006);

(Cont'd)

see also 44 C.F.R. § 206.7 ("All directives, known as mission assignments, to other Federal agencies shall be in writing, or shall be confirmed in writing if made orally, and shall identify the specific task to be performed and the requirements or criteria to be followed."). Thus, certain specified FEMA officials may use mission assignments to "direct any Federal agency to utilize its authorities and the resources granted to it under Federal law . . . to support emergency efforts by State and local governments to save lives; protect property, public health and safety; and lessen or avert the threat of a catastrophe," or to "direct any Federal agency to provide emergency assistance necessary to save lives and to protect property, public health, and safety by: [e.g.,] . . . [d]istributing medicine, food, and other consumable supplies." 44 C.F.R. § 206.5. FEMA uses mission assignments to allocate resources, coordinate agency tasks, and ensure reimbursement for expenses. *See* Dep't of Homeland Sec., Nat'l Response Plan at ESF # 5-2. When an agency is tasked through a mission assignment, however, it may ask another agency to provide support for a sub-task, *see id.* at FIN-4, or may issue a "mission assignment task order," which is a "specific instruction given to a Federal agency under a mission assignment directing it to perform work of *certain quantity* or in a *certain area* under that mission assignment," *see* Fed. Emergency Mgmt. Agency, Recovery Policy 9523.9: 100% Funding for Direct Federal Assistance and Grant Assistance, at VII(A)(2) (June 9, 2006).

S.Rep. No. 109-322 (2006). Among the many shortcomings, FEMA officials displayed a lack of situational awareness that led to organizational inaction, and critical elements of the NRP were executed late, ineffectively, or not at all. *See* H.R.Rep. No. 109-377, at 2-5. More specifically, the record reveals that federal agencies did not initiate decisive action to assist evacuees at the Convention Center until September 2, 2005, and contains no evidence of any mission to aid evacuees at the Cloverleaf.

B. Procedural Background

Plaintiffs filed their first series of complaints in 2006 (the "2006 complaints"). They alleged claims against the United States, various federal agencies, and certain federal officers in their individual and official capacities. Herbert brought suit alleging wrongful death and survival actions against the United States, DHS, and Secretary Chertoff for Ms. Freeman's death. He amended his complaint to name Secretary Chertoff, Secretary of Health and Human Services Michael Leavitt, and Secretary of Defense Donald Rumsfeld in their individual and official capacities. Barbara Lee, Brenda Bissant, Glenda Eleby, Griffin Eleby, Jr., Rosalie Brooks, Dorothy Beal, Earline Coleman, Ethel Jackson, and Nancy Eleby filed a complaint alleging wrongful death and survival actions against the United States and Secretary Chertoff, Secretary Leavitt, Secretary Rumsfeld, and FEMA Director Michael Brown, in their individual and official capacities for Ms. Eleby's death. Finally, Frances Lodriguss brought suit alleging

wrongful death and survival actions against the United States, and Secretary Chertoff, Secretary Leavitt, Secretary Rumsfeld, and Director Brown, in their individual and official capacities, for Mr. DeLuca's death. The district court consolidated the three cases.

Plaintiffs brought their claims under the Stafford Act, 42 U.S.C. §§ 5121-5208, for failure to properly follow the NRP. Additionally, Herbert claimed that defendants' actions gave rise to liability under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671-2680. Defendants responded by filing a motion to dismiss the claims against the United States, the federal agencies, and all individuals in their official capacities for lack of subject matter jurisdiction. Citing both the discretionary function exception of the Stafford Act, 42 U.S.C. § 5148, and the discretionary function exception of the FTCA, 28 U.S.C. § 2680(a), the government argued that the United States has not waived its sovereign immunity for discretionary conduct and that the NRP did not create any nondiscretionary duties.[5] Plaintiffs responded to the motion by arguing that: (1) it was premature because they were entitled to discovery to determine whether defendants breached non-discretionary duties; and (2) defendants violated non-discretionary NRP directives in the provision of disaster relief assistance.

---

5. The government also argued that plaintiffs, with the exception of Mr. Freeman, had not exhausted their administrative remedies.

Appendix A

On April 24, 2007, while the motion to dismiss was pending, plaintiffs filed a new round of complaints (the "2007 complaints"). The 2007 complaints raised similar facts as the 2006 complaints. The 2007 complaints, however, alleged tort claims under the FTCA only against the United States and claimed exhaustion of available administrative remedies.

Less than a week later, the district court granted defendants' motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction on the grounds of sovereign immunity. The court, assuming that the Stafford Act provided a limited waiver of sovereign immunity, concluded that the Stafford Act's discretionary function exception, § 5148, should be analyzed in the same manner as the FTCA's discretionary function exception, § 2680(a); therefore, it applied the United States Supreme Court's two-part test for determining the applicability of the FTCA's discretionary function exception, *see United States v. Gaubert*, 499 U.S. 315, 322-23, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988). The district court concluded that the first prong was satisfied because plaintiffs "point[ed] to no specific, *mandatory* directive found within the statutory scheme of the Stafford Act or its accompanying federal regulations that [d]efendants are alleged to have ignored in the aftermath of Hurricane Katrina." *See Freeman v. U.S. Dep't of Homeland Sec.*, Nos. 06-4846, 06-5689 & 06-5696, 2007 WL 1296206, *6 (E.D.La. Apr. 30, 2007) (emphasis in original). The district court rejected plaintiffs'

attempt to rely on the NRP as the basis for the mandatory directives because "the NRP does not prescribe a specific course of conduct for federal employees to follow." *Id.* at *7. Next, the district court held that the second prong of the two-part test was satisfied because the government's "allocation of resources in the aftermath of Katrina not only includes the element of judgment or choice . . . but that element of choice is clearly one grounded in social, economic, and public policy." *Id.*

Finally, the district court denied plaintiffs' request for pre-dismissal discovery because "the fact-based discovery that [p]laintiffs are anxious to obtain only comes into play once they identify the specific directive that [d]efendants have ignored." *Id.* The court reasoned that discovery would not "assist [plaintiffs] in meeting this crucial threshold requirement" because any mandatory directive would necessarily be in the "public realm." *Id.* Thus, the district court dismissed the claims against the United States, its agencies, and federal officers in their official (but not individual) capacities, for lack of subject matter jurisdiction under Rule 12(b)(1). *Id.* at *8.[6]

Subsequently, the district court consolidated plaintiffs' 2007 complaints with the remainder of the

6. On an unopposed motion from the government, the district court substituted *nunc pro tunc* the United States for the federal agencies and individual defendants for all claims arising under the FTCA that were dismissed by the district court.

2006 complaints, which remained pending against individual defendants in their individual capacities. Director Brown then moved to dismiss the claims against him, and the government moved to dismiss the FTCA claims for the reasons specified in the district court's prior order of dismissal.

Plaintiffs undertook several actions in response. First, they sought to amend their complaints to allege that the United States instituted an "aid blockade" by intentionally refusing to send aid to the Convention Center and the Cloverleaf. Second, plaintiffs opposed both motions to dismiss by reasserting their opposition to dismissal on the grounds that the NRP created mandatory directives and that dismissal was premature because discovery was necessary to identify nondiscretionary duties. The district court held a hearing on the motions on October 3, 2007. The court granted plaintiffs' motions to amend. Thereafter, however, it granted Director Brown's and the government's motions to dismiss. In its brief order, the court adopted the reasons given in its order of April 30, 2007.[7] Plaintiffs filed a timely notice of appeal. They appeal only the district court's dismissal of their FTCA claims against the United States. We have jurisdiction under 28 U.S.C. § 1291.

---

7. Plaintiffs at various times filed notices under Rule 41 of the Federal Rules of Civil Procedure dismissing from the lawsuit Secretary Chertoff, Secretary Rumsfield, and Secretary Leavitt, in their individual capacities, because they had not been served and had not been subject to either of the court's orders of dismissal.

Appendix A

II. DISCUSSION

A. *Discretionary Function Exception to the Stafford Act*

We must determine whether the district court properly dismissed the case under Rule 12(b)(1) for lack of subject matter jurisdiction on the ground that the United States has not waived sovereign immunity for its decisions related to its provision of disaster relief services under the NRP. "We review a district court's dismissal for lack of subject matter jurisdiction *de novo*." *Stiles v. GTE Sw., Inc.*, 128 F.3d 904, 906 (5th Cir.1997). "In our *de novo* review . . . , we apply the same standard as does the district court . . . ." *Wagstaff v. U.S. Dep't of Educ.*, 509 F.3d 661, 663 (5th Cir.2007) (internal quotation marks and citation omitted). Under our traditional explication of the standard applied by the district court, the district court "has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). Here, the district court did not resolve any disputed facts, so we, as did the district court, "consider the allegations in the plaintiff[s'] complaint as true." *Id.* at 412. "[O]ur review is limited to determining whether the district court's application of the law is correct" and, to the extent its "decision [was] based on undisputed facts, whether those facts are indeed undisputed." *Id.* at 413.

We then ask if dismissal was appropriate. *See Gaubert*, 499 U.S. at 327, 111 S.Ct. 1267 (" 'accept[ing] all of the factual allegations in [the plaintiff's] complaint as true' and ask[ing] whether the allegations state a claim sufficient to survive a motion to dismiss" (quoting *Berkovitz*, 486 U.S. at 540, 108 S.Ct. 1954)).

"Plaintiff[s] bear[ ] the burden of showing Congress's unequivocal waiver of sovereign immunity." *St. Tammany Parish v. Fed. Emergency Mgmt. Agency*, No. 08-30070, 2009 WL 146582, at *6 (5th Cir. Jan. 22, 2009). "At the pleading stage, plaintiff[s] must invoke the court's jurisdiction by alleging a claim that is facially outside of the discretionary function exception." *Id.* at *6 & n. 3 (citing *Gaubert*, 499 U.S. at 324-25, 111 S.Ct. 1267).

"The basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *335 *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983); *see also Williamson v. U.S. Dep't of Agric.*, 815 F.2d 368, 373 (5th Cir.1987) ("The doctrine of sovereign immunity is inherent in our constitutional structure and . . . renders the United States [and] its departments . . . immune from suit except as the United States has consented to be sued."). Because "[s]overeign immunity is jurisdictional in nature," *F.D.I.C. v. Meyer*, 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994), Congress's "waiver of [it] must be unequivocally expressed in statutory text and will not be implied," *Lane v. Pena*, 518 U.S. 187, 192,

116 S.Ct. 2092, 135 L.Ed.2d 486 (1996) (internal citation omitted); *see also Petterway v. Veterans Admin. Hosp.*, 495 F.2d 1223, 1225 n. 3 (5th Cir.1974) ("It is well settled . . . that a waiver of sovereign immunity must be specific and explicit and cannot be implied by construction of an ambiguous statute.").

Plaintiffs have alleged claims under the FTCA for failure to provide due care in the provision of emergency aid pursuant to the NRP. The FTCA authorizes suits against the United States for damages arising from:

> injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). Thus, the FTCA waives sovereign immunity and permits suits against the United States sounding in state tort for money damages. *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 252 (5th Cir.2006). As long as state tort law creates the relevant duty, the FTCA permits suit for violations of federal statutes and regulations. *See Johnson v. Sawyer*, 47 F.3d 716, 728 (5th Cir.1995) (en banc) ("If the requisite relationship and duty exist, then the statutory or regulatory violation may constitute or be evidence of

negligence in the performance of that state law duty.").[8] The FTCA, however, excepts discretionary functions and duties from this waiver of sovereign immunity. *See* 28 U.S.C. § 2680(a). The FTCA's "discretionary function exception" provides that the waiver of sovereign immunity in § 1346(b) does not apply to:

> Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id. The "discretionary function exception is thus a form of retained sovereign immunity." *In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 190 (2d Cir.2008).[9]

---

8. Because plaintiffs appeal the district court's grant of defendant's motion to dismiss for lack of subject matter jurisdiction, we need not consider the merits of whether their claims give rise to tort liability under Louisiana law.

9. It " 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.' " *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954 (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense* (*Varig Airlines*), 467 U.S. 797, 808, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984)). It is intended to "assure protection for the Government against tort liability for errors in administration or in the exercise of discretionary functions." *Dalehite v. United States*, 346 U.S. 15, 26-27, 73 S.Ct. 956, 97 L.Ed. 1427 (1953) (citation omitted).

Appendix A

The government promulgated the NRP under authority granted, in part, by the Stafford Act. "Although the Stafford Act does not contain a waiver of sovereign immunity, it does contain a discretionary function exception to governmental liability nearly identical to the one contained in the FTCA." *St. Tammany Parish*, No. 08-30070, 2009 WL 146582, *8 (internal citation omitted) (citing *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1001 (9th Cir.1998)). The Stafford Act's discretionary function exception provides that the United States will not be liable for:

> any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

42 U.S.C. § 5148. "The Stafford Act's discretionary function exception exists, despite the lack of an express waiver of sovereign immunity, to protect the government from liability for claims based on its discretionary conduct brought pursuant to the FTCA, [the Administrative Procedures Act, 5 U.S.C. §§ 701 et seq.], or other statutes of general applicability." *St. Tammany Parish*, No. 08-30070, 2009 WL 146582, *9. "Nonetheless, this provision 'preclude[s] judicial review of all disaster relief claims based upon the discretionary actions of federal employees.' " *Id.* at *9 (citing *Rosas v. Brock*, 826 F.2d 1004, 1008 (11th Cir.1987)).

The parties begin by disputing the meaning of the Stafford Act's discretionary function exception as it applies to the claims alleged in this case. In a companion case in which we addressed the same issue, we held that " 'discretionary function or duty' has the same meaning in § 5148 as its does in § 2680(a)." *St. Tammany Parish*, No. 08-30070, 2009 WL 146582, *9. We reached this conclusion after reviewing the nearly identical texts of the two provisions and the legislative history of the Stafford Act and after rejecting the government's counterarguments-which were the same arguments that the government maintains in this case. *See id.* *11; *accord In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d at 188-89 (holding that the FTCA's and Stafford Act's discretionary function exceptions "employ practically identical language: both provide protection for the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a [F]ederal agency or an employee of the [Federal] Government." (internal quotation marks and citations omitted, alterations in original)). Thus, we may rely on precedent interpreting the phrase "discretionary function or duty" under the FTCA's discretionary function exception to provide meaning to the Stafford Act's discretionary function exception in this case. *See St. Tammany Parish*, No. 08-30070, 2009 WL 146582, *11.[10]

---

10. The FTCA's and Stafford Act's discretionary function provisions are not identical. For example, § 2680(a) expressly precludes review "whether or not the discretion involved be

(Cont'd)

B. Duties under the NRP

We now determine the applicability of § 5148 of the Stafford Act to this case by turning to the well-established precedent defining discretionary conduct under § 2680(a) of the FTCA. The Supreme Court has developed a two-part test for determining whether the federal government's conduct qualifies as a discretionary function or duty under this exception. *See Gaubert*, 499 U.S. at 322-23, 111 S.Ct. 1267 (citing *Berkovitz*, 486 U.S. at 536-37, 108 S.Ct. 1954).

First, the conduct must be a "matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954. "The exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.' " *Gaubert*, 499 U.S. at 322, 111 S.Ct. 1267 (quoting *Berkovitz*, 486 U.S. at 536, 108 S.Ct. 1954) (alteration in original). Thus, " 'it is the nature of the conduct, rather than the status of the actor' that governs whether the exception applies." *Id.* (quoting *Varig Airlines*, 467 U.S. at 813, 104 S.Ct. 2755). If a statute, regulation, or policy leaves it to a federal agency or employee to determine when and how to take action, the agency is not bound to act in a particular manner and the exercise of its authority is discretionary. *See id.*

(Cont'd)
abused," while § 5148 contains no such express provision. Here, however, we need not decide the import of this difference in statutory language because plaintiffs have not argued that government agencies or agents abused their discretion; instead, they have argued that they lacked discretion.

at 329, 111 S.Ct. 1267. On the other hand, "[t]he requirement of judgment or choice is not satisfied" and the discretionary function exception does not apply "if a 'federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow,' because 'the employee has no rightful option but to adhere to the directive.' " *Id.* at 322, 111 S.Ct. 1267 (quoting *Berkovitz,* 486 U.S. at 536, 108 S.Ct. 1954).

Second, "even 'assuming the challenged conduct involves an element of judgment,' " we must still decide that the " 'judgment is of the kind that the discretionary function exception was designed to shield.' " *Id.* at 322-23, 111 S.Ct. 1267 (quoting *Berkovitz,* 486 U.S. at 536, 108 S.Ct. 1954); *see also Varig Airlines,* 467 U.S. at 813, 104 S.Ct. 2755. "Because the purpose of the exception is to 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort,' when properly construed, the exception 'protects only governmental actions and decisions based on considerations of public policy.' " *Gaubert,* 499 U.S. at 323, 111 S.Ct. 1267 (quoting *Berkovitz,* 486 U.S. at 537, 108 S.Ct. 1954). With this understanding, however, "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324, 111 S.Ct. 1267. "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the

nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325, 111 S.Ct. 1267.

In this case, plaintiffs argue that the government failed to perform or was negligent in its performance of the specific duties prescribed by the NRP—namely, the provision of food, water, shelter, medical assistance, and transport to the Convention Center and to the Cloverleaf. (*See* Pls.' Br. 34 ("The Convention Center and Cloverleaf certainly fall into the categories of places where the federal government had an express duty to provide the support that meant the difference between life and death for these three Plaintiffs.")); *see also Gaubert,* 499 U.S. at 324, 111 S.Ct. 1267 ("[A]n agency may rely on internal guidelines rather than on published regulations."). The NRP directives that plaintiffs cite permit agents to exercise judgment or choice that is subject to policy analysis. We therefore hold that the government's conduct under the NRP—even its failure to provide food, water, shelter, medical assistance, and transport to the Convention Center and to the Cloverleaf—qualifies under the Stafford Act's discretionary function exception.

Under the first prong of the *Berkovitz* test, plaintiffs fail to identify any specific, nondiscretionary function or duty that does not involve an element of judgment or choice. To the contrary, plaintiffs cite a large number of NRP provisions that contain generalized, precatory, or aspirational language that is too general to prescribe a specific course of action for an agency or employee to follow.

Plaintiffs first allege that Secretary Chertoff failed to comply with the NRP Base Plan's requirement that within 120 days of the NRP's issuance he identify and establish procedures for the rapid deployment of appropriate assets. *See* Dep't of Homeland Sec., Nat'l Response Plan, at ix. According to plaintiffs, Secretary Chertoff completed this duty on September 6, 2005, beyond the 120-day window and after the events in this case.[11] We conclude that, despite the delay, this agency time line created no judicially enforceable duty on the part of Secretary Chertoff. *Cf. Action on Smoking & Health (ASH) v. Dep't of Labor*, 100 F.3d 991, 993-94 (D.C.Cir.1996) (treating more formalized statutory and regulatory deadlines as nonmandatory, aspirational goals that do not circumscribe the discretion of the agency to delay formation of policy in good faith).

Plaintiffs next cite numerous provisions of the Annex as prescribing specific action. These provisions can be grouped into two categories: (1) plan context, and (2) agency responsibilities. Neither category gave rise to a nondiscretionary duty. With respect to the Annex's context, the "Situation" section noted that in devastating natural disasters, "[m]edical support is required not only at medical facilities, but at casualty evacuation points, evacuee and refugee points and shelters, and at other locations to support field operations." Dep't of Homeland Sec., Nat'l Response Plan, at CAT-2. The

11. It is somewhat unclear whether plaintiffs allege Secretary Chertoff's failure to promulgate procedures pursuant to the NRP-CIS or failure to develop the NRP-CIS itself.

ostensibly mandatory language "is required," when read in light of the broad goals of the Annex-which "establishe[d] the context and overarching strategy"—did nothing more than explain the needs that arise in an emergency. Satisfaction of those needs was a broad, implied goal allowing for significant choice in its implementation by federal agencies. This broad goal, therefore, satisfies the first prong of the discretionary function test. *See Shansky v. United States*, 164 F.3d 688, 691 (1st Cir.1999) (A "broadly worded expression of a general policy goal contained in the [agency's] operating manual . . . suggests that the [agency] and its functionaries will have to make discretionary judgments about how to apply concretely the aspirational goal embedded in the statement."); *Tippett v. United States*, 108 F.3d 1194, 1197 (10th Cir.1997) ("[T]he general goal of protecting human life in the nation's national parks is not the kind of specific mandatory directive that operated to divest [the federal agent] of discretion in the situation he faced."); *Valdez v. United States*, 56 F.3d 1177, 1180 (9th Cir.1995) ("While the said policy guidelines certainly outline general policy goals regarding visitor safety, the means by which [agency] employees meet these goals necessarily involves an exercise of discretion."); *Autery v. United States*, 992 F.2d 1523, 1529 (11th Cir.1993) ("Such a general guideline is insufficient to deprive the federal government of the protection of the discretionary function exception." (internal quotation marks and citations omitted)). We reach the same conclusion for

other contextual provisions that plaintiffs cite, such as those contained in the Annex's "Planning Assumptions" and "Concept of Operations" sections.[12]

Plaintiffs also identify "responsibilities" that the Annex allocated to specific agencies. For example, once the NRP processes are implemented, the Annex tasks DHS with, e.g., activating and deploying resources in accordance with the NRP-CIS; identifying and operationalizing facilities to support the deployment of federal resources; and maintaining communications to ensure a common understanding of resource

12. The planning assumption that "Federal support must be provided in a timely manner to save lives" was expressly an *assumption*, not a specific directive, and was modified by a sentence suggesting the exercise of judgment on the part of agency officials: "This may require mobilizing and deploying assets before they are requested via normal NRP protocols." Dep't of Homeland Sec., Nat'l Response Plan, at CAT-3. The same conclusion applies to the "guiding principle" that "[n]otification and full coordination with States occur, but the coordination process should not delay or impede the rapid mobilization and deployment of critical Federal resources," and the description that the federal government should ensure that "[i]ncident-specific resources and capabilities (e.g., medical teams, search and rescue teams, equipment, transportable shelters, preventive and therapeutic pharmaceutical caches, etc.) are activated and prepare for deployment to a Federal mobilization center or staging area near the incident site." *Id.* at CAT-4. These provisions did not direct specific action from federal agencies or employees and certainly did not require the provision of resources to the Convention Center and the Cloverleaf, as necessary for subject matter jurisdiction in this case.

requirements. Dep't of Homeland Sec., Nat'l Response Plan, at CAT-5. We conclude that these (and similar) responsibilities were so general that they too fail to prescribe a nondiscretionary course of action. Almost by definition these "responsibilities" required the agency to exercise judgment and choice to define specific directives or functions. "Statements made at this level of generality do not satisfy *Gaubert*'s and *Berkovitz*'s specific prescription requirement. Were the law otherwise, the discretionary function exception would be a dead letter." *Shansky*, 164 F.3d at 691; *see also Rosebush v. United States*, 119 F.3d 438, 442 (6th Cir.1997) ("The relevant inquiry is whether the controlling statutes, regulations and administrative policies mandated that the [agency engage in relevant conduct] in any *specific* manner." (internal citation omitted, emphasis in original)); *Ochran v. United States*, 117 F.3d 495, 500-01 (11th Cir.1997) ("[T]he use of the word 'shall' in describing the responsibilities of the AUSA does not necessarily mean that the Guidelines left no room for the AUSA to exercise judgment or choice . . . . [T]he provisions . . . leave room for responsible officials to exercise choice or judgment in discharging their responsibilities." (internal citations omitted)). Simply put, these responsibilities required judgment and choice to make them applicable to specific situations.

Aside from the provisions of the NRP, plaintiffs offer cursory argument that mission assignments gave rise to nondiscretionary directives satisfying the first prong of the *Berkovitz* test and that an aid blockade also gave

rise to the federal government's liability. Plaintiffs' assertions are misplaced. We initially note that plaintiffs did not present argument related to the mission assignments to the district court. We typically will not entertain legal arguments or evidence presented for the first time on appeal; however, because mission assignments were mentioned in passing in the record, we will dispose of plaintiffs' argument here. The issuance of mission assignments is left to the discretion of FEMA. *See* 44 C.F.R. § 206.5. Mission assignments are often nonspecific, requiring an agency to exercise additional judgment or choice regarding, e.g., where and how to complete the requested mission. The evidence cited by plaintiffs does not support the existence of a specific mission assignment (let alone sub-tasks), for which an employee had no lawful option but to adhere, that ordered the provision of assistance to evacuees at the Convention Center or the Cloverleaf prior to decedents' deaths.[13]

---

13. In their brief, plaintiffs rely on mission assignments issued to Department of Defense ("DOD") and Department of Transportation ("DOT"); however, taken in the light most favorable to plaintiffs, the record evidence reveals that these mission assignments did not give rise to a specific directive that would have benefitted decedents. The August 30, 2005 mission assignment to DOD mentioned by Director Brown related to airlifting FEMA officials to the Superdome, and, to the extent it might have been applied more broadly, DOD officials would have had to exercise judgment regarding where, how, when, and how frequently to conduct the airlifts. It did not specifically mandate airlifts to the Convention Center or the Cloverleaf. Similarly, the August 31, 2005 mission assignment to DOT mentioned by Director Brown related to the delivery of 500 buses for general use in evacuations (which again was not a specific directive).

Regarding the aid blockade, plaintiffs allege in their amended complaint that the federal government prevented the American Red Cross from accessing the Convention Center and the Cloverleaf from August 30 to September 2, 2005. Assuming the truth of these allegations, as we must, plaintiffs fail to explain what nondiscretionary duty the federal government violated. Overall, the federal government's functions and duties under the NRP satisfy the first prong of the two-part test because they permit the exercise of judgment and choice.[14]

Under the second prong of the *Berkovitz* test, we hold that the government's decisions about when, where,

---

14. For the first time in their reply brief and as part of their argument that the government owed a duty in tort, plaintiffs assert a "special relationship" that gave rise to an affirmative duty to protect where the federal government's negligence in designing or building the flood control system imposed a limitation on decedents' freedom to act on their own behalf and thus resulted in a "state-created danger." (See Pls.' Reply Br. 14-18.) Because they raise this argument only in their reply brief, we will not address it. We only note that, among the many other reasons to reject plaintiffs' assertion, the government is likely immune from such suits under the Flood Control Act of 1938, 33 U.S.C. § 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."); and, whatever the viability of the state-created danger theory of liability in this circuit, their argument is meritless by reference to plaintiffs' own theory of the case (see Pls.' Br. 14 ("At the outset, it must be noted this is not a 'flood' case, but one concerning events which took place after the city of New Orleans flooded . . . .")).

and how to allocate limited resources within the exigencies of an emergency are the types of decisions that the discretionary function exception was designed to shelter from suit. Although plaintiffs contend that complying with the NRP was not policy-related,[15] they

---

15. Plaintiffs rely on *Downs v. United States*, 522 F.2d 990 (6th Cir.1975), to contend that the NRP gave rise to no choice or judgment; however, their argument is better interpreted as arguing that choices and judgments under the NRP are not the kind that the Stafford Act's discretionary function exception was designed to protect. In 1975, without the benefit of the guidance provided by *Berkovitz* and *Gaubert*, the Sixth Circuit in *Downs* considered a situation in which an FBI agent dealing with a hijacked airplane and hostages chose a confrontational approach instead of a "waiting game" approach. *Id.* at 1002. The court of appeals concluded that the decision was contrary to the FBI Handbook, which emphasized "hostage safety and pilot cooperation." *Id.* The court held that "the FBI agents were not involved in formulating governmental policy" because that policy "had previously been promulgated in the FBI Handbook and in a memorandum jointly issued by the Departments of Transportation and Justice." *Id.* at 997. Without more information about the relevant provisions of the FBI Handbook, *Downs* has little functional value to our present analysis, and more importantly, we discount its conclusion, which distinguished between operational and planning negligence, in the aftermath of *Gaubert*'s express rejection of that dichotomy. *Gaubert* held that:

> A discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking

(Cont'd)

formulate no legal argument or factual development to support their conclusion. In light of the "strong presumption" that, where permitted by the relevant statute or regulation, the exercise of choice or judgment implicates relevant policy, *see Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267, decisions regarding the feasibility, safety, and benefit of mobilizing federal resources in the aftermath of a national disaster are grounded in social, economic, and public policy, *see, e.g.*, Dep't of Homeland Sec., Nat'l Response Plan, at 6 (documenting policy considerations in the deployment of federal resources). As such, these decisions are clearly "susceptible to policy analysis," even if specific decisions were not the result of such a reasoned analysis. *See Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267; *Shansky*, 164 F.3d at 688. Thus, we hold that the Stafford Act's discretionary function exception precludes subject matter jurisdiction in this case because the NRP and other authorities leave policy-related choices or judgments to the discretion of the involved federal agencies.

(Cont'd)

> affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level.

499 U.S. at 325, 111 S.Ct. 1267.

C. Entitlement to Discovery

The last question is whether the district court should have allowed plaintiffs to engage in limited discovery before dismissing the 2007 complaints so that plaintiffs could attempt to identify jurisdiction-establishing functions or duties not immunized from suit under the discretionary function exception. The district court held that "the fact-based discovery that Plaintiffs are anxious to obtain only comes into play once they identify the specific directive that [d]efendants have ignored. Such a directive will be in the public realm and therefore fact discovery will not assist them in meeting this crucial threshold requirement." *Freeman*, 2007 WL 1296206, at *7. We review the district court's evidentiary rulings for abuse of discretion. *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir.2003); *Williamson v. U.S. Dep't of Agric.*, 815 F.2d at 382 ("It hardly bears repeating that control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable."); *Mayo v. Tri-Bell Indus., Inc.*, 787 F.2d 1007, 1012 (5th Cir.1986) (same). We find no abuse of discretion in this case.

The party seeking discovery bears the burden of showing its necessity. *See Sec. & Exch. Comm'n v. Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir.1980) (holding that in the context of a summary judgment motion, the party seeking discovery "must conclusively justify his entitlement . . . by specifically demonstrating 'how postponement of a ruling on the

motion will enable him, by discovery or other means, to rebut the movant's showing' " and "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts" (internal citations omitted)). The party seeking discovery typically meets this burden by alleging the "specific facts crucial to immunity which demonstrate[ ] a need for discovery." *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 852 (5th Cir.2000). On the other hand, a party is not entitled to jurisdictional discovery if the record shows that the requested discovery is not likely to produce the facts needed to withstand a Rule 12(b)(1) motion. *See Williamson v. U.S. Dep't of Agric.*, 815 F.2d at 382. This is particularly true where the party seeking discovery is attempting to disprove the applicability of an immunity-derived bar to suit because immunity is intended to shield the defendant from the burdens of defending the suit, including the burdens of discovery. *See Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.1992) (observing the "tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery"); *cf. Anderson v. Creighton*, 483 U.S. 635, 646 n. 6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) ("One of the purposes of the [*Harlow v. Fitzgerald*, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982),] qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' "); *Williamson v. U.S. Dep't of Agric.*, 815 F.2d at 382-83 (affirming stay of discovery where absolute and qualified immunity applied).

Here, we find no fault in the district court's conclusion that a mandatory directive, if one existed, could be found in the public realm. Plaintiffs have not presented any argument addressing the district court's conclusion. While we need not decide whether the sources of a nondiscretionary federal directive, for the purposes of the discretionary function exception, will always be in the public domain, we conclude that in this case plaintiffs' allegations are based on statutes, regulations, and other authorities that are publicly available.[16] Despite the district court's holding, plaintiffs have failed to articulate a discrete discovery request that might cure the jurisdictional deficiency and have failed to otherwise specify where they might discover the necessary factual predicate for subject matter jurisdiction; thus, we have no choice but to affirm. *See, e.g., Gager v. United States*, 149 F.3d 918, 922 (9th Cir.1998) (affirming denial of discovery because plaintiffs "have not specified in any way where such additional evidentiary material might be found"); *Arriba Ltd.*, 962 F.2d at 534 (permitting discovery only "circumspectly and only to verify allegations of specific facts crucial to an immunity determination").

Even if we assume that some relevant jurisdictional fact may not be available outside of discovery, plaintiffs have not made the requisite showing entitling them to

---

16. This is particularly true here, where plaintiffs have relied on numerous congressional investigations regarding the government's response to Hurricane Katrina. *See generally, e.g.*, H.R.Rep. No. 109-377; S.Rep. No. 109-322.

such discovery. In their brief to this court, plaintiffs asseverate that discovery would reveal whether governmental mistakes were the result of an exercise of discretion or operational negligence, of delays in answering mission assignments, of nonchalance in pre-positioning supplies and personnel, of failing to provide adequate medical supplies, or of blockading the American Red Cross from evacuation points. This amorphous discovery request-which is at least more detailed than the general request asked of the district court to permit discovery to "flesh out" specifics of negligence-fails to assert the existence of a particular federal regulation, order, or directive (or the potential contents of any such authority) that is not already known in this case and that falls outside of the discretionary function exception. Nor do plaintiffs suggest how discovery might lead to such a directive; thus, the district court did not abuse its discretion when it denied this broad request for discovery. *See Mesa v. United States*, 123 F.3d 1435, 1439 (11th Cir.1997) (holding that appellants failed to "point[ ] to any requested discovery that could reasonably be expected to reveal" conduct outside of the discretionary function exception); *see also In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 365 (3d Cir.2001) (affirming stay of discovery pending dispositive motion where proposed discovery was for claims within the FTCA's discretionary function exception); *Creek Nation Indian Hous. Auth. v. United States*, 905 F.2d 312, 313 (10th Cir.1990) (affirming denial of discovery before plaintiff could ascertain a violation of a nondiscretionary duty where the plaintiff failed to identify any applicable nondiscretionary regulation);

Miller v. United States, 710 F.2d 656, 666 (10th Cir.1983) (affirming denial of discovery where "there are no facts which plaintiffs could arguably develop to escape the effect of the statutes and regulations," which were "within the discretionary function exception").

The district court's conclusion is particularly sound in light of the reasons for which the Stafford Act's discretionary function exception confers immunity from suit. Congress intended the discretionary function exception to shelter the government from the burdens of answering a lawsuit—including those related to intrusive discovery—not just from potential monetary liability. *See Rosas*, 826 F.2d at 1008 ("[T]he legislative history of the statute reveals that Congress was concerned not only about the possible costs of paying damages, but also the certain costs of defending suits arising from government relief."). Without a more discrete, tailored request, we find no abuse of discretion and will not subject the executive branch to discovery in a case over which the district court lacks jurisdiction. *See Gaubert*, 499 U.S. at 324-25, 111 S.Ct. 1267 ("For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime.").

III. CONCLUSION

The tragedies that gave rise to this litigation were compounded by the well-documented inability of all levels of government to provide timely relief to the hurricane's victims. The federal government has publicly admitted that it made many mistakes; however, even if those mistakes caused decedents' deaths, which we are presently in no position to determine, the federal government's negligence does not give rise to tort liability absent the United States's express waiver of sovereign immunity. For the above explained reasons, we conclude that the United States has not waived sovereign immunity for the discretionary functions alleged in this case and therefore AFFIRM the district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1).

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED APRIL 30, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 06-4846 C/W
06-5689 & 06-5696

SECTION: "A" (5)

HERBERT FREEMAN, JR., ET AL.

VERSUS

UNITED STATES DEPARTMENT OF HOMELAND SECURITY, ET AL.

ORDER AND REASONS

Before the Court is a **Motion to Dismiss (Rec.Doc.13)** filed by the United States of America, Michael Chertoff, in his official capacity as Secretary of Homeland Security, the United States Department of Homeland Security, Michael Leavitt, in his official capacity as Secretary of Health and Human Services, the Department of Health and Human Services, Donald Rumsfeld, in his official capacity as Secretary of Defense, the Federal Emergency Management Agency, and Michael Brown, in his official capacity as former

director of the Federal Emergency Management Agency (collectively "Defendants" or "the United States"). Plaintiffs Herbert Freeman, Jr., Frances Lodriguss, Barbara Eleby Lee, Brenda Bissant, Glenda Eleby, Griffin Eleby, Jr., Rosalie Brooks, Dorothy Beal, Earline Coleman Ethel Jackson, and Nancy Eleby oppose the motion. The motion, set for hearing on April 4, 2007, is before the Court on the briefs without oral argument. For the reasons that follow, the motion is GRANTED.

I. BACKGROUND

Plaintiffs in these consolidated cases are the relatives and/or representatives of Ethel Freeman, John J. DeLuca, and Clementine Eleby ("the Decedents"). Each of the Decedents passed away in the days immediately following Hurricane Katrina. Plaintiffs contend that the deaths were caused by Defendants' failure to follow their lawful duties in the aftermath of Hurricane Katrina. Defendants move for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

Civil Action 06-4846

This action was filed by Herbert Freeman, Jr., individually and in his capacity as representative of the Estate of Ethel Freeman. Prior to Katrina, Mrs. Freeman was elderly and infirm and required a wheelchair for mobility. The Freemans rode out the storm in their New Orleans home but the home flooded in the aftermath of Katrina when the levees gave way.

Mr. Freeman secured a boat from a friend and placed Mrs. Freeman, and her wheelchair in the boat. Mr. Freeman proceeded to higher ground and New Orleans Police officers eventually directed the Freemans to the New Orleans Convention Center.

Mr. Freeman alleges that the Convention Center was not manned or equipped to handle evacuees. He complains that the conditions were squalid and that no triage, food, water, or medical assistance was provided. Mrs. Freeman died on Wednesday, September 1, 2005.

Freeman alleges that Defendants failed to follow their non-discretionary duties under the National Response Plan ("NRP") to take appropriate steps to marshal resources and to aid the city, the state, and evacuees like Mrs. Freeman. (Comp. ¶ 25). Freeman claims that Defendants' negligence in failing to provide adequate shelter, medical services, triage, evacuation, and transport to facilities where appropriate medical care could be provided resulted in Mrs. Freeman's wrongful death. (*Id.* ¶ 26).

Freeman also claims that by failing to follow "the public law, the Stafford Act and public policy, the National Response Plan" Defendants denied Mrs. Freeman equal protection under the law because she was discriminated against because of her age and infirmity. (Amend.Comp.¶ 3). Freeman alleges that the violation of Mrs. Freeman's equal protections rights under the Fourteenth Amendment proximately caused her death. (*Id.* ¶¶ 4-6).

Appendix B

Freeman submitted an administrative tort claim to FEMA, DHHS, and DOD. DHHS denied the claim but FEMA and DOD have yet to issue denials. Freeman seeks wrongful death and survivor action damages for the loss of his mother.

Civil Action 06-5689

This action was filed by Frances Lodriguss, the sister of the decedent John J. DeLuca. Prior to Katrina, Mr. DeLuca was a seventy-seven year old mobility impaired, chronically ill man who resided at the Nazareth Inn, an independent and assisted living facility located in New Orleans East. Mr. DeLuca rode out Katrina at the Nazareth Inn but was trapped by flood waters in the storm's aftermath. Mr. DeLuca was taken by helicopter to a location on Interstate 10 at its interchange with Causeway Boulevard.

According to the complaint, there was no shelter, food, water, security, medical services or transportation at this location. (Comp. ¶ 21). Buses began to arrive on August 31st but no one was in charge to ensure the evacuation of the elderly and infirm. (*Id.* ¶ 22). On September 2, 2005, Mr. DeLuca collapsed and was taken by helicopter to the airport. Mr. DeLuca died on September 3, 2005.

Lodriguss alleges that Defendants owed Mr. DeLuca a duty of care to provide transportation and medical care in the aftermath of the storm. Lodriguss alleges that Defendants' failure to deliver a rapid and

appropriate federal response was the proximate cause of Mr. DeLuca's death and was in violation of his rights to equal protection under the Fourteenth Amendment to the U.S. Constitution, federal law, and public policy. (*Id.* ¶ 28). Lodriguss alleges that Defendants' negligence and/or their adoption of an unconstitutional policy which deprived the elderly and infirm of an equal chance of survival violated her brother's constitutional rights and caused his death. (*Id.* ¶ 30). Lodriguss seeks wrongful death and survivor action damages for the loss of her brother.

Civil Action 06-5696

This action was filed by Barbara Eleby Lee, Brenda Bissant, Glenda Eleby, Griffin Eleby, Jr., Rosalie Brooks, Dorothy Beal, Earline Coleman Ethel Jackson, and Nancy Eleby, the children of the decedent Clementine Eleby. Prior to Katrina, Ms. Eleby was a seventy-nine year old bedridden paralyzed woman who was residing with her daughter Barbara Eleby Lee in New Orleans East. The Elebys rode out the storm in their New Orleans East home but were trapped by flood waters in the storm's aftermath. The Elebys were eventually transported to the Convention Center where they arrived on August 31, 2005.

Plaintiffs allege that the Convention Center was not manned or equipped to handle evacuees. They complain that the conditions were squalid and that no triage, food, water, or medical assistance was provided. Mrs. Eleby died at the Convention Center on September 1, 2005.

Plaintiffs allege Defendants' failure to deliver a rapid and appropriate federal response was the proximate cause of Mrs. Eleby's death and was in violation of her rights to equal protection under the Fourteenth Amendment to the U.S. Constitution, federal law, and public policy. (*Id.* ¶ 31). Plaintiffs allege that Defendants' negligence and/or their adoption of an unconstitutional policy which deprived the elderly and infirm of an equal chance of survival violated their mother's constitutional rights and caused her death. (*Id.* ¶ 33). Plaintiffs seek wrongful death and survivor action damages for the loss of their mother.

II. THE PARTIES' CONTENTIONS

Defendants' motion pertains to the claims against the United States and the individual defendants *in their official capacities only.* Defendants contend that dismissal is proper under Rule 12(b)(1) (lack of subject matter jurisdiction) because the Court lacks jurisdiction over these claims because the United States has not waived its sovereign immunity with respect to the claims at issue. Specifically, Defendants contend that neither the Stafford Act, the Administrative Procedure Act, nor the Federal Tort Claims Act ("FTCA") provide a waiver of sovereign immunity. Further, Defendants contend that the waiver of immunity contained in the Stafford Act and FTCA does not apply because the provision of disaster assistance in the aftermath of Katrina is a discretionary act excepted from the waiver of sovereign immunity contained in those statutory provisions.

Next, Defendants contend that dismissal of the Fourteenth Amendment claims is proper under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) because the Fourteenth Amendment applies only to States' actions and not to actions by the United States. Finally, Defendants contend that Plaintiffs' claims (with one exception as to Freeman) are not actionable under the FTCA because they have failed to satisfy the jurisdictional prerequisites to sue the United States in tort.

In opposition, Plaintiffs clarify that they do not oppose dismissal of the Fourteenth Amendment claims against Defendants in their official capacities because the guarantee of equal protection binds only the States.

Plaintiffs argue that Congress did not confer total immunity on the United States when it passed the Stafford Act. Rather, the Act includes discretionary function exception language much like that contained in the FTCA.

Plaintiffs concede that Freeman is the only Plaintiff with a FTCA claim currently pending in this litigation and that this claim is directed at FEMA's conduct in the aftermath of Katrina. Freeman contends that his complaint alleges the breach of non-discretionary duties and that the Court cannot resolve any underlying fact disputes under the guise of ruling on a 12(b)(1) or 12(b)(6) motion. Freeman contends that additional discovery is needed to determine more precisely the facts regarding the failures of FEMA in the preparation

for and response to the storm. Freeman contends that the federal government has no discretion when it comes to its duty to comply with mandatory policies and regulations dictating the measures to be taken to protect the citizenry from the aftermath of disasters.

In reply, Defendants point out that concessions in Plaintiffs' opposition narrow the focus of the pending motion to whether the discretionary function exceptions within the Stafford Act and the FTCA apply.

III. DISCUSSION

1. General Legal Principles

In general where subject matter jurisdiction is being challenged under Rule 12(b)(1), the trial court is free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case. *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir.2004) (citing *Land v. Dollar*, 330 U.S. 731 (1947)). No presumptive truthfulness attaches to the plaintiff's allegations and the court can decide disputed issues of material fact in order to determine whether or not it has jurisdiction to hear the case. *Id.* However, where issues of fact are central both to subject matter jurisdiction and the claim on the merits, the trial court must assume jurisdiction and proceed to the merits of plaintiff's case under either Rule 12(b)(6) or Rule 56. *Id.* (citing *Williamson v. Tucker*, 645 F.2d 404 (5th Cir.1981)). Under well-settled standards governing Rule 12(b)(6) motions to dismiss, a claim may not be dismissed

unless it appears certain that the plaintiff cannot prove any set of facts that would entitle him to legal relief. *In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 251 (5th Cir.2006) (citing *Benton v. United States*, 960 F.2d 19 (5th Cir.1992)).

The doctrine of sovereign immunity renders the United States, its departments, and its employees in their official capacities immune from suit except as the United States has consented to be sued. *Williamson v. United States Dep't of Agriculture*, 815 F.2d 368, 373 (5th Cir.1987). Absent an express waiver of federal immunity by Congress, the United States, its departments, and its employees in their official capacities are immune from suit. *Supreme Beef Processors*, 468 F.2d at 252. A waiver of the United States' sovereign immunity must be unequivocally expressed in statutory text. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Waivers of sovereign immunity are narrowly construed in favor of the United States. *Id* .

Congress partially waived the United States' sovereign immunity from tort claims by enacting the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b).[1]

---

1. 28 U.S.C. § 1346, entitled United States as a Defendant, provides that the district courts shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or

(Cont'd)

Brown v. United States, 653 F.2d 196, 198 (5th Cir.1981). The FTCA allows a plaintiff to pursue tort actions against the federal government and it holds the government liable as if it were a defendant in state court. *Supreme Beef Processors*, 468 F.3d at 252. The liability of the United States under the Act arises only when the law of the state would impose it. *Brown*, 653 F.2d at 201. The FTCA is the sole basis of recovery for tort claims against the United States. *Supreme Beef Processors*, 468 F.3d at 252 n. 4. The FTCA is subject to strict limitations one of which is the discretionary function exception codified at 28 U.S.C. § 2680(a).[2] When

---

(Cont'd)

> omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C.A. § 1346(b)(1) (West 2006).

2. 28 U.S.C. § 2680, entitled Exceptions, provides that the FTCA waiver of immunity does not apply to

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C.A. § 2680(a) (West 2006).

applicable the discretionary function exception deprives the court of subject matter jurisdiction and it cannot be waived. *Id.* (citing *Hayes v. United States*, 899 F.2d 438 (5th Cir.1990)).

The Stafford Act, also known as the Disaster Relief Act of 1974, was enacted to provide federal assistance to states in times of disasters. *Diversified Carting, Inc. v. City of N.Y.*, 423 F.Supp.2d 85, 90 (S.D.N.Y 2005) (citing 42 U.S.C. § 5121, *et seq.*). To the extent that the Stafford Act allows for a private right of action against the federal government,[3] the United States retains its sovereign immunity with respect to any activities that are "based on the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of [the Act]." 42 U.S.C.A. § 5148 (West 2003). Courts generally use the same discretionary function exception analysis for claims brought under the Stafford Act as well as the FTCA. *See, e.g., McWaters*, 408 F.Supp.2d at 229.

---

3. *See Graham v. FEMA*, 149 F.3d 997, 1001 (9th Cir.1998) ("[T]he Stafford Act does not provide for a private cause of action upon which the plaintiffs may rely. . . ."). *But see Diversified Carting, Inc. v. City of N.Y.*, 423 F.Supp.2d 85, 90-91 (S.D.N.Y.2005) (implicitly recognizing a private right of action under the Stafford Act); *McWaters v. FEMA*, 408 F.Supp. 22 221, 228-29 (E.D.La.2006) (implicitly recognizing a private right of action under the Stafford Act).

2. Analysis

All claims under attack at this juncture are claims against the United States directly, and claims against federal employees in their *official* capacities, which are in effect claims against the United States. The United States cannot be sued absent an express and unequivocal waiver of sovereign immunity so the first hurdle that Plaintiffs must clear is the sovereign immunity bar. If the United States has not expressly waived its sovereign immunity for the claims at issue, then the Court lacks subject matter jurisdiction over the claims and they are subject to dismissal pursuant to Rule 12(b)(1). The Court does not believe that issues of fact play a key role in the sovereign immunity analysis but to the extent that they do the Court will follow the standards applicable to Rule 12(b)(6) motions to dismiss and construe all disputed facts in Plaintiffs' favor.

The claims against the United States are brought under the FTCA and the Stafford Act.[4] The FTCA includes express statutory text that waives immunity

4. The instant motion does not challenge the *Bivens* claims brought against the individual defendants in their personal or non-official capacities. Under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and its progeny, victims of a constitutional violation by a federal agent have a right of action to recover damages against the agent in his individual capacity. *Williamson*, 815 F.2d at 380. However, the United States does not become vicariously liable for the constitutional torts of its officials because the United States has not waived sovereign immunity for such actions. *Brown*, 653 F.2d at 199.

for certain tort claims so long as the claim is not based on a discretionary function or duty. The Stafford Act, on the other hand, contains no express and unequivocal language purporting to waive the United States' immunity from suit. However, § 5148 of the Act[5] is a discretionary function exception, and Plaintiffs reason that Congress must have intended to allow some claims under the Act because § 5148 would not be necessary if all claims under the Act were already barred by sovereign immunity. The Court questions whether such reverse reasoning suffices under the strict requirements imposed by the Supreme Court's jurisprudence in order to find a waiver of sovereign immunity.[6] *See, e.g., Lane*, 518 U.S. at 192.

---

5. Section 5148, Nonliability of Federal Government, provides:

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

42 U.S.C.A. § 5148 (West 2003).

6. Even if the Stafford Act provides no express waiver of sovereign immunity, the Administrative Procedures Act ("APA"), 5 U .S.C. § 701, *et seq.*, contains a limited waiver of sovereign immunity to permit judicial review to those aggrieved of agency actions. However, the waiver of immunity contained in the APA, which also includes a discretionary function exception, does not allow for the recovery of money damages (Cont'd)

Clearly, however, to the extent that a waiver of immunity does exist under the Stafford Act, actions based on discretionary functions are not included in that waiver. *See* 42 U.S.C.A. § 5148. At this juncture, the Court will *assume* that the Stafford Act does contain a limited waiver of immunity for non-discretionary functions. Because both the FTCA and the Stafford Act include discretionary function exceptions, the sole issue before the Court today is whether Plaintiffs' claims are based upon the performance (or non-performance) of a discretionary function or duty on the part of Defendants. If the discretionary function exception applies, then sovereign immunity will bar Plaintiffs' claims.

3. Discretionary Function Analysis

Courts use the same *Berkovitz* discretionary function analysis for claims brought under the FTCA and the Stafford Act. *See, e.g., McWaters*, 408 F.Supp.2d at 229. In *Berkovitz v. United States*, the Supreme Court explained and expounded upon the established principles that guide the determination of whether the discretionary function exception bars a suit against the United States. 486 U.S. 531, 536 (1988). "[I]t is the nature

---

(Cont'd)

against the United States. *Taydus v. Cisneros*, 902 F.Supp. 278 284 (D.Mass.1995) (citing 5 U.S.C. § 702); *Armstead v. Nagin*, No. 05-6438, 2006 WL 3861769, at * 8 (E.D.La. Dec. 29, 2006) (Duval, J.). Given that Plaintiffs are seeking to recover money damages for wrongful death they cannot take advantage of the APA's waiver of sovereign immunity as a means of going forward with this lawsuit.

of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id*. (quoting *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984)). In examining the nature of the challenged conduct, a court must first consider whether the conduct involves an element of judgment or choice for the acting employee. *Id.* (citing *Dalehite v. United States*, 346 U.S. 15 (1953)). The discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. *Id.* In this event the employee has no rightful option but to adhere to the directive. *Id*.

Assuming the challenged conduct involves an element of judgment, the court must then determine whether that judgment is the kind that the discretionary function exception was designed to shield. *Berkovitz*, 486 U.S. at 536. The discretionary function exception serves to "prevent judicial 'second guessing' of legislative and administrative decisions ground in social, economic, and political policy through the medium of an action in tort." *Id.* (quoting *Varig Airlines*, 467 U.S. at 814). The exception properly construed protects only governmental actions and decisions based on public policy. *Berkovitz*, 486 U.S. at 537. In sum, the discretionary function exception insulates the United States from liability if the action challenged in the case involves the permissible exercise of policy judgment. *Id.*

Pursuant to *Berkovitz*, this Court must analyze Plaintiffs' specific allegations of governmental

wrongdoing in light of the applicable statutory and regulatory scheme governing the provision of disaster relief following a natural disaster such as Hurricane Katrina. In particular, Plaintiffs must identify a specific *mandatory* directive that Defendants had a clear duty under federal law to perform. And if the specific mandatory directive nevertheless involves an element of judgment, then application of the discretionary function exception will turn on whether the officials making that judgment permissibly exercised policy choice. *Berkovitz*, 486 U.S. at 545.

The Stafford Act is codified at 42 U.S.C. §§ 5121, *et seq.* Freeman[7] points to no specific, *mandatory* directive found within the statutory scheme of the Stafford Act or its accompanying federal regulations that Defendants are alleged to have ignored in the aftermath of Katrina. Defendants correctly point out that the Act is replete with discretionary language particularly in those sections that address federal emergency assistance. *See, e.g.*, 42 U.S.C.A. § 5192 (West 2003) ("In any emergency, the President ***may*** direct any Federal agency . . . to utilize its authorities and the resources granted to it under Federal law . . . in support

---

7. The parties agree that at this time Freeman is the only plaintiff in the consolidated cases with an FTCA claim currently pending before the Court. That claim has been asserted against FEMA and the Department of Homeland Security. At this time Lodriguss and the Eleby plaintiffs are alleging claims based solely on violations of the Decedents' constitutional rights. Lodriguss and the Eleby plaintiffs anticipate eventually amending their complaints to add claims under the FTCA.

of State and local emergency assistance efforts to save lives, protect property and public health and safety, and lessen or avert the threat of a catastrophe.") (emphasis added). Freeman cannot meet the threshold requirement for a waiver of immunity under the Stafford Act, *i.e.*, identification of a *mandatory* duty under the law. Thus, Freeman's claims under the Stafford Act are barred by sovereign immunity.

Freeman also relies upon the National Response Plan as the source of a mandatory directive or duty imposed on Defendants under federal law. The National Response Plan ("NRP") was developed by the Secretary of the Department of Homeland ("DHS") at the direction of the President. Homeland Security Presidential Directive/HSPD-5, 2003 WL 604606 (Feb. 28, 2003). The purpose of the HSPD-5 is to "enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system." *Id.* The main goal of HSPD-5 was to come up with a plan so that all levels of government would have the capability to work together to prevent and respond to terrorist attacks, major disasters, and other emergencies. *Id.* HSPD-5 expressly notes that "[i]nitial responsibility for managing domestic incidents generally falls on State and local authorities. The Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved." *Id.*

Appendix B

As part of HSPD-5 the President directed the Secretary of Homeland Security to develop the NRP which "shall integrate Federal Government domestic prevention, preparedness, response, and recovery plans into one all-discipline, all hazards plan." *Id.* The NRP, with respect to domestic incidents, was to provide the structure and mechanisms for national level policy and operational direction for Federal support to State and local incident managers. . . ." *Id.* The NRP, as envisioned by the President, would include protocols for operating under different threats or threat levels, incorporate existing federal emergency and incident plans. *Id.* The NRP was to include a "consistent approach to reporting incidents, providing assessments, and making recommendations to the President. . . ." *Id.*

The version of the NRP relied upon by Freeman is dated December 2004 and a six page excerpt is filed in the record. (Pla.Oppo.Exh.1). This document, which was authored by a single agency head, is not an executive order, Congressional statute, or properly promulgated federal regulation so as to constitute federal "law." It is a questionable legal proposition to say the least that this document could be used as a basis for imposing a mandatory, non-discretionary duty under federal law, the likes of which could be used to overcome the United States' sovereign immunity.

Freeman's reliance on the NRP is also problematic because the NRP does not prescribe a specific course of conduct for federal employees to follow. Freeman quotes several passages from the NRP and alleges that

the NRP called for DHS and FEMA to deploy vital resources including medical teams and equipment to evacuate patients who needed medical care and to comply with an urgent duty to save lives. (Freeman Comp. ¶ 25). Freeman alleges that Defendants had a non-discretionary duty under the NRP to take appropriate steps to marshal resources and to aid the city, the state and evacuees, including Freeman. (*Id.*).

The NRP and its Annexes are worded for the most part in precatory language and even where stronger "must" language is used the document is still a very high level overview of the anticipated rollout plan for federal resources during a domestic incident. Likewise, the annex sections quoted by Freeman in his complaint recognize from a practical perspective the things that need to occur following a domestic incident. However, implicit in the structure of this generalized document is the discretion and flexibility that the affected agencies retain to allocate their limited resources in response to a disaster such as Hurricane Katrina. The NRP simply does not provide a source of non-discretionary *duties* imposed on Defendants under federal law. Further, the timing and scope of FEMA's allocation of resources in the aftermath of Katrina not only includes the element of judgment or choice for the acting agency employees but that element of choice is clearly one grounded in social, economic, and public policy.

Plaintiffs assert that Defendants' motion must be denied because Plaintiffs have alleged in their complaint that Defendants breached non-discretionary duties, and

Appendix B

Plaintiffs repeatedly point out that they must be afforded an opportunity to conduct discovery prior to dismissal. Plaintiffs' contention is contrary to *Berkovitz* which makes clear that a mere "assertion" that a federal actor has breached a non-discretionary duty is insufficient to avoid dismissal. Rather, the *Berkovitz* analysis demonstrates the need to identify, as a threshold matter, a *specific* mandatory, non-discretionary directive that the federal actor has violated.

Further, the fact-based discovery that Plaintiffs are anxious to obtain only comes into play once they identify the specific directive that Defendants have ignored. Such a directive will be in the public realm and therefore fact discovery will not assist them in meeting this crucial threshold requirement.

In sum, the actions being challenged in this lawsuit are the types of actions that Congress intended to shield from liability under both the Stafford Act and the FTCA. One might contend that the federal decisions made in conjunction with Hurricane Katrina demonstrated nonchalance and/or incompetence on the part of those involved. The Government has publicly admitted that it made many mistakes in the aftermath of Hurricane Katrina. One can only speculate at this point whether these mistakes caused the tragic deaths of the Decedents.

Even assuming that the Government's mistakes caused these deaths, Congress has not exempted such claims from the discretionary function exception. This

Court is very sympathetic to the Plaintiffs for the loss of their loved ones, however, this Court is prohibited from changing the laws that Congress has enacted. As such, the Court lacks the authority to award money damages for claims in which the plaintiffs are not legally entitled. Because Plaintiffs have not identified a non-discretionary directive that Defendants failed to follow, no waiver of sovereign immunity applies. Plaintiffs' Stafford Act and FTCA claims against the United States and the remaining defendants in their official capacities must be dismissed for lack of subject matter jurisdiction.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion to Dismiss (Rec.Doc.13)** filed by the United States of America, Michael Chertoff, in his official capacity as Secretary of Homeland Security, the United States Department of Homeland Security, Michael Leavitt, in his official capacity as Secretary of Health and Human Services, the Department of Health and Human Services, Donald Rumsfeld, in his official capacity as Secretary of Defense, the Federal Emergency Management Agency, and Michael Brown, in his official capacity as former director of the Federal Emergency Management Agency should be and is hereby **GRANTED.**

April 30, 2007

s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 18, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-31066

HERBERT FREEMAN, Jr., Individually and in his capacity as representative of the estate of Ethel Freeman

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

BARBARA ELEBY LEE; BRENDA BISSANT; GLENDA ELEBY; GRIFFIN ELEBY, JR.; ROSALIE BROOKS; DOROTHY BEAL; EARLINE COLEMAN; ETHEL JACKSON; NANCY ELEBY

Plaintiffs - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appendix C

FRANCES LODRIGUSS

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

BARBARA ELEBY LEE; BRENDA BISSANT; GLENDA ELEBY; GRIFFIN ELEBY, JR.; ROSALIE BROOKS; DOROTHY BEAL; RODNEY JACKSON, for the Estate of Ethel Jackson; NANCY ELEBY

Plaintiff - Appellants

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Louisiana at New Orleans

ON PETITION FOR REHEARING

Before KING, DeMOSS and PRADO, Circuit Judges.

Appendix C

PER CURIAM:

IT IS ORDERED that the petition for rehearing is *denied. Note 14 has been appropriately corrected.*

ENTERED FOR THE COURT:

s/ Carolyn [illegible] King
United States Circuit Judge

APPENDIX D — RELEVANT STATUTES

The Stafford Act, at 42 U.S.C. § 5148,

> The Federal Government shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a ***discretionary function or duty*** on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter.

The Federal Tort Claims Act, 28 U.S.C. § 2680

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> > (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a ***discretionary function or duty*** on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.